

**THE CONTINUING STRUGGLE FOR JUST, EFFECTIVE AND CONSTITUTIONAL SENTENCING
AFTER *UNITED STATES v. BOOKER***

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In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that judicial determinations of fact not found by a jury or admitted by the defendant to increase sentences under the Federal Sentencing Guidelines violated the Sixth Amendment. As a remedy, the Court excised 18 U.S.C. § 3553(b), which created a presumption in favor of the guideline range (“the court shall . . . unless the court finds . . .”), and excised 18 U.S.C. § 3742(e), which was designed to enforce the guidelines (by requiring *de novo* review of the factual basis, legal basis and extent of any departure, while reviewing within guideline sentences for correctness). The Court made § 3553(a) the governing sentencing law, thus rendering the guidelines “advisory,” and prescribed a unitary standard of review -- “unreasonableness” with regard to § 3553(a) -- for *all* sentences within or outside the guideline range.

Eighteen months later, seven courts of appeals say the guidelines are presumptively reasonable on appeal.¹ While purporting to apply an abuse of discretion standard to below-guideline sentences, this review is virtually equivalent to *de novo*.² District court judges within these circuits, and even some in circuits that have rejected this view, apply a presumption at sentencing, while finding the facts by a mere preponderance of the “probably accurate” hearsay. In short, federal defendants continue to be sentenced in violation of their constitutional rights.

How did this occur? Some say it was the inevitable and even intended effect of Justice Breyer’s remedy.³ If so, other institutional actors have added potent fuel to the fire. The Department of Justice (DOJ) has periodically let it be known that a legislative “fix” was in the works. Its “fix” has not yet been introduced in the House, has garnered no visible support in the Senate, and would not likely survive a

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¹ *United States v. Dorcely*, ___ F.3d ___, 2006 WL 2034245 (D.C. Cir. 2006); *United States v. Cage*, 451 F.3d 585 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Mykitiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005). While the Eight Circuit has adopted a presumption of reasonableness, *see, e.g., United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005), it has also rejected the position that “the range of reasonableness is essentially co-extensive with the Guideline range” because that “would effectively render the Guidelines mandatory. . . . The Guidelines range is merely one factor.” *United States v. Winters*, 416 F.3d 856, 861 (8th Cir. 2005). A panel of the Sixth Circuit adopted the presumption without explanation, *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006), but then made clear that it does not apply unless the district court actually recognized its discretion to impose a non-guideline sentence, considered the § 3553(a) purposes and factors, exercised its independent judgment as to what sentence is sufficient but not greater than necessary to satisfy the purposes of sentencing, and gave a reasoned explanation for the sentence. *United States v. Foreman*, 436 F.3d 638 (6th Cir. 2006); *United States v. Buchanan*, 449 F.3d 731, 738-41 (6th Cir. 2006) (Sutton, J., concurring).

² *E.g., United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006); *United States v. Saenz*, 428 F.3d 1159 (8th Cir. 2006).

³ *Booker*, 543 U.S. at 311-13 (Scalia, J., dissenting in part), *id.* at 288 (Stevens, J., dissenting in part); *United States v. Kandirakis*, ___ F.Supp.2d ___, 2006 WL 2147610 (D. Mass. Aug. 1, 2006).

constitutional challenge even if enacted.⁴ Nonetheless, the threat of a “fix” has undoubtedly had its intended effect.⁵ On the litigation front, DOJ has openly defied the Supreme Court, issuing a directive to all line prosecutors to “actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases” and to report “sentences outside the appropriate Sentencing Guideline range.”⁶ As an early commentator predicted, this directive may “strike fear into the hearts of judges who may have the ‘temerity’ to exercise discretion beyond that found in the Guidelines, which brings into question just how ‘advisory’ the Guidelines will be.”⁷

The premise of the reincarnation of presumptive guidelines is the fiction that the guidelines incorporate the sentencing purposes and factors that 18 U.S.C. § 3553(a) directs judges to consider. This first appeared in a district court decision issued the day after *Booker* was decided,⁸ next appeared in the Sentencing Commission’s testimony before Congress,⁹ was then disseminated by the Commission to

⁴ See Constitution Project’s Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 8-9 (July 11, 2006); Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule Harris*, 18 Fed. Sent. Rep. 4 (April 2006).

⁵ See *United States v. Wilson*, 355 F. Supp.2d 1269, 1287-88 (D. Utah 2005) (“Should the courts fail to carry out congressional will, there should be little doubt what will follow. Congress can easily implement its desired level of punitiveness in the criminal justice system, through such blunderbuss devices as mandatory minimum sentences. It is far better, then, for courts to exercise their discretion to insure that Congress’ intention is implemented today through close adherence to the congressionally-approved Guidelines system, with only rare exceptions for unusual situations.”); *United States v. Jimenez-Beltre*, 440 F.3d 514, 521-24 (1st Cir. 2006) (Howard, J., concurring) (writing separately to “emphasize that sentencing courts are still to accord the guidelines substantial weight and that sentences outside the guidelines sentencing range are reasonable only so long as and only to the extent that they can be said to comport with the Sentencing Reform Act of 1984 I cannot say that these positions are required by the language of *Booker* [but they are] likely to yield a federal sentencing regime that accords with Congress’s policy preferences. . . . [I]f post- *Booker* sentencing practices come to be perceived as resembling too much the non-uniform sentencing that gave rise to the guidelines, Congress may well respond with legislation that circumscribes judicial power and discretion even more tightly.”).

⁶ Memorandum to All Federal Prosecutors from James B. Comey, Deputy Attorney General, January 28, 2005, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf.

⁷ Zachary R. Gates, *Obeying the “Speed” Limit: Framing the Appropriate Role of EPA Criminal Enforcement Actions Against Clandestine Drug Laboratory Operators*, 13 Penn St. Envtl. L. Rev. 173, 208 n.197 (Summer 2005).

⁸ *United States v. Wilson*, 350 F.Supp.2d 910 (D. Utah 2005).

⁹ See Prepared Testimony of Judge Ricardo H. Hinojosa Before the Subcommittee on Crime, Terrorism and Homeland Security (Feb. 10, 2005) (“During the process of developing the initial set of guidelines and in refining them throughout the ensuing years, the Sentencing Commission has considered the factors listed at section 3553(a) and cited with approval in *Booker*. . . . In short, the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision.”) (hereinafter “2/10/05 Commission Testimony”), <http://www.uscourts.gov/Blakely/bookertestimony.pdf>. See also Prepared Testimony of Judge Ricardo H. Hinojosa before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives at (March 16, 2006) (“The guidelines embody all of the applicable sentencing factors for a given offense and offender.”) (hereinafter “3/16/06 Commission Testimony”), <http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf>.

judges, probation officers and prosecutors across the country in training presentations and written materials,¹⁰ and was soon repeated verbatim in judicial opinions.¹¹ Courts of appeals that had originally adopted a presumption of reasonableness without giving a reason,¹² later justified the presumption with the assertion that the guidelines already incorporate the sentencing purposes and factors set forth in 18 U.S.C. § 3553(a).¹³

There are three serious problems with this rationale. First, it is not accurate according to the Commission's own reports, the guidelines manual, and reliable historical sources including Justice Breyer. Second, the only difference between the system it creates and the system just struck down (in which departures were allowed based on factors not taken into account by the Commission) is that there can be no rationale for *ever* varying from the guideline range, making the guidelines even more mandatory than they were before *Booker*.¹⁴ Third, judicial factfinding by a preponderance of the evidence in this system is therefore unconstitutional.

Five courts of appeals (with varying degrees of commitment) and many district court judges have declined to accept the premise that the guidelines incorporate the statutory purposes and factors or the conclusion that they are to be presumptively followed.¹⁵ Though I count the First Circuit in this group, that court is unique in having held, inconsistently, that the guidelines are not due a presumption on appeal but that the district court may accord them substantial weight at sentencing. In joining the former holding and dissenting from the latter, Judge Lipez wrote:

There is scant difference between treating a guidelines sentence as presumptively controlling and stating that the court will depart from that sentence only for "clearly identified and persuasive reasons." . . .

There are some who contend that the advisory guidelines largely account for all of the relevant

¹⁰ U.S. Sentencing Commission, *Post-Booker Guidelines Training 2006*, Tab 1 ("guidelines consider" each listed purpose and factor), Tab 7 (containing 2/10/05 Commission Testimony), on file with the author; U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing 42* (March 2006) ("training program explains how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight in fashioning sentences post-*Booker*") (hereinafter "*Booker Report*"), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

¹¹ See *United States v. Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005); *United States v. Peach*, 356 F.Supp.2d 1018, 1021 (D.N.D. 2005).

¹² See *United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005).

¹³ See *United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006).

¹⁴ See Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 Ariz. St. L.J. 425, 453-54 (2006).

¹⁵ *United States v. Hunt*, ___ F.3d ___, 2006 WL 2285715 (11th Cir. Aug. 10, 2006); *United States v. Carty*, 453 F.3d 1214 (9th Cir. 2006); *United States v. Grier*, 449 F.3d 558 (3d Cir. 2006); *United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006); *United States v. Cooper*, 437 F.3d 324, 331-32 (3d Cir. 2006). For illustrative district court decisions, see *United States v. Jaber*, 362 F.Supp.2d 365, 370-76 (D. Mass. 2005); *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019, 1025 (D. Neb. 2005); *United States v. Myers*, 353 F.Supp.2d 1026 (S.D. Iowa 2005); *United States v. Ranum*, 353 F.Supp.2d 984 (E.D. Wis. 2005).

sentencing factors. See, e.g., *Shelton*, 400 F.3d at 1332 n.9 ("The factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under Booker and § 3553(a)."); see also Prepared Testimony of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives (Feb. 10, 2005), available at <http://www.ussc.gov/Blakely/bookertestimony.pdf> (last visited Feb. 25, 2006) (same). That being so, the argument goes, there must still be primary reliance on the guidelines in sentencing.

This argument is too facile. As the majority points out, the guidelines are inescapably generalizations. They say little about "the history and characteristics of the defendant." Indeed, the guidelines prohibit consideration of certain individualized factors The guidelines also discourage--except in "exceptional cases"--consideration of other individualized factors

The guidelines are no longer self-justifying. They are not the safe harbor they once were. However, if district courts assume that the guidelines sentence complies with the sentencing statute, and focus only on the compliance of the non-guidelines sentence urged by the defendant, the district courts will effectively give the guidelines a controlling weight and a presumptive validity that is difficult to defend under the constitutional ruling in *Booker*. . . . [G]iven the close divisions on the Court about the post-*Booker* role of the guidelines, and given the new composition of the Court, it would be foolhardy to ignore the constitutional dangers of adopting an approach to the guidelines post-*Booker* that approximates, in a new guise, the mandatory guidelines.¹⁶

Indeed, Justice Scalia and Justice Stevens predicted that the remedial opinion may invite the *de facto* mandatory guidelines that the merits opinion forbade.¹⁷ One would hope that the justices who voted for the remedy (Breyer, Kennedy and Ginsburg, JJ., remaining) did not intend that result. Justice Ginsburg, at least, may be quite dismayed. She recently indicated how she would rule on presumptive guidelines in a new guise: "In sum, *Recuenco*, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments."¹⁸

The Court has granted certiorari in *Cunningham v. California*, No. 05-6551, 2006 WL 386377 (*cert. granted*, Feb. 21, 2006), to decide whether California's presumptive sentencing system is constitutional. Under California law as written, the punishment for Cunningham's offense of conviction was 6, 12 or 16 years' imprisonment, with the middle term required absent facts in aggravation or mitigation. The court found aggravating facts by a preponderance of the evidence and sentenced Cunningham to the upper term of 16 years. While this appears to be a flat violation of *Blakely v. Washington*, 542 U.S. 296 (2004), the California Court of Appeal affirmed, relying on *People v. Black*, 35 Cal. 4th 1238 (Cal. 2005). In *Black*, the California Supreme Court held that the California system did not violate *Blakely* because, it said, California's sentencing law gave sentencing courts "discretion" to sentence to the lower, middle or upper term, with the middle term being "presumptive" and the upper term being the "statutory maximum" for Sixth Amendment purposes. *Id.* at 1257-58. In its Brief in Opposition, the State of California argued that the California system is indistinguishable from the federal sentencing system left in place by *Booker*, in that the presumptive middle term is functionally equivalent to the

¹⁶ *Jimenez-Beltre*, 440 F.3d at 524, 526-27, 528 & n.11 (Lipez, J., dissenting). See also *United States v. Navedo-Concepcion*, 450 F.3d 54, 60 (1st Cir. 2006) (Torruella, J., dissenting) ("I am concerned that we are . . . regressing to the same sentencing posture we assumed before the Supreme Court decided *Booker*. . . . [I do not] believe that this is what the Supreme Court had in mind when it struck down the mandatory Guidelines regime.").

¹⁷ *Booker*, 543 U.S. at 311-13 (Scalia, J., dissenting in part), *id.* at 288 (Stevens, J., dissenting in part).

¹⁸ *Washington v. Recuenco*, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting).

“reasonableness constraint” placed on federal courts by *Booker*.¹⁹ The Court has also ordered the Solicitor General to respond to several petitions challenging the return to presumptive guidelines in the federal system.

Defense counsel must help to ensure that judges retain *and* exercise their sentencing power by providing arguments to support reasoned decisions that will be upheld on appeal (or not appealed at all), that Congress can respect, and that the public can understand. There are powerful arguments to be preserved below and raised in petitions for certiorari that post-*Booker* sentencing violates the sentencing law under basic principles of statutory construction, the Sixth Amendment right to jury trial, the Fifth Amendment right to proof beyond a reasonable doubt, and the Sixth Amendment right to confront and cross-examine adverse witnesses. But, as we have seen, legal arguments are not enough.

Even in circuits that have rejected presumptive guidelines, the guidelines provide a comfortable numerical anchor, and many judges have little knowledge of the guidelines’ history and development other than what they are being told by advocates of the status quo. Further, just as in the lower courts, the outcome in the Supreme Court will depend on whether a majority believes that the guidelines are a reflection of § 3553(a) created by an independent expert body that followed its enabling legislation, as the Solicitor General contends in opposing petitions for certiorari. Thus, regardless of what circuit you are in or what stage of the litigation, it is necessary to demonstrate as a factual matter that the guidelines do not comply with 18 U.S.C. § 3553(a), and that a lower sentence does a far superior job. (At the same time, it is still critically important to litigate all legal and factual issues arising under the guidelines.)

¹⁹ Brief in Opposition of the State of California at 8-9, 10, 2005 WL 3783460 (filed Dec. 12, 2005).

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I. The Guidelines Do Not Incorporate the Purposes and Factors Set Forth in § 3553(a) or Other Statutory Directives to Ensure Fair, Efficient and Effective Sentences.

In the Sentencing Reform Act of 1984 (SRA), Congress directed the Sentencing Commission to assure that the purposes of sentencing set forth in § 3553(a)(2) (just punishment, deterrence, incapacitation as needed to protect the public, and needed education or treatment in the most effective manner) were met, to ensure that the guidelines were effective in meeting those purposes, to reflect advancement in knowledge of human behavior, to minimize the likelihood of prison overcrowding, and to avoid unwarranted disparities while ensuring sufficient flexibility to permit individualized sentences.²⁰ After *Booker*, under § 3553(a), judges must impose sentences sufficient but not greater than necessary to achieve the statutory purposes of sentencing, after considering the circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted disparities, and the need to provide restitution. Had the guidelines been developed according to congressional directives to the Commission, there might have been substantial overlap between the guidelines and § 3553(a) in many cases, though the guidelines would still be inescapably general. Given the way in which the guidelines were actually developed, it should be a rare case in which a sentence within the guideline range, much less above it, meets § 3553(a)'s requirements.

A. Abandonment of Sentencing Purposes and Past Practice in Favor of “Trade-Offs Among Commissioners with Different Viewpoints”

The Commission now claims that it “considered the factors listed in section 3553(a) and cited with approval in *Booker* . . . in developing the initial set of guidelines and refining them throughout the ensuing years.”²¹ Historical sources tell a different story.

Congress expected the Commission to consider all four statutory purposes in developing the guidelines, and that judges would decide what impact, if any, each purpose should have on the sentence in each case.²² The original Commissioners, however, “considered” only “just deserts” and “crime control,” then expressly abandoned those two purposes when they could not agree on which should predominate.²³ They solved their “philosophical dilemma” by adopting an “empirical approach that uses data estimating the existing sentencing system as a starting point,”²⁴ but did not follow that approach either. They implemented sentences “significantly more severe than past practice” for “the most frequently sentenced offenses in the federal courts,” including fraud, drug trafficking (above even what the mandatory minimum laws required), immigration offenses, robbery of an individual, murder, aggravated assault, and rape.²⁵

These deviations from past practice resulted from “trade-offs’ among Commissioners with

²⁰ 28 U.S.C. §§ 991(b), 994(g).

²¹ 2/10/05 Commission Testimony, *supra* note 9.

²² See S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 77 (1984).

²³ U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988).

²⁴ *Id.*

²⁵ U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47 (2004) (hereinafter “Fifteen Year Report”), available at http://www.ussc.gov/15_year/15year.htm.

different viewpoints,” said then Judge and Commissioner Breyer.²⁶ In response to complaints that the original guidelines were “too harsh,” he said that “once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad” and the “resulting compromises do not seem too terribly severe.” In any event, the system was “evolutionary” and would be improved based on information from actual practice under the guidelines.²⁷

B. Rejection of Relevant Mitigating Factors/Overstatement of Aggravating Factors of Questionable Relevance

The Commission now claims that the “guidelines embody all of the applicable sentencing factors for a given offense and offender.”²⁸ However, as the Commission has said repeatedly, it is not possible to write a single set of guidelines that take into account all factors that are potentially relevant to sentencing decisions.²⁹ Further, the Commission has affirmatively rejected most relevant mitigating factors, while including a seemingly endless number of aggravating factors, many of questionable relevance, and giving them too great an impact.

The only offender characteristic included in the calculation of the guideline range is the aggravating one of criminal history. Yet, the principal source of legislative history for the SRA suggests numerous situations in which offender characteristics should be relevant, and emphasizes that “the Committee decided to describe [some of] these factors as ‘generally inappropriate,’ rather than always inappropriate, . . . in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration.”³⁰ As then Judge and Commissioner Breyer explained, some Commissioners argued that mitigating factors such as age, employment history, and family ties should be included. They were not because, once again, the Commissioners could not agree. Again, this was intended to evolve based on experience.³¹ No other offender characteristics have been added, though the Commission’s research demonstrates that age, current or previous marriage, employment history, educational level, abstinence from drug use, first offender status, and being a drug or fraud offender all predict a reduced risk of recidivism.³² Instead, the Commission has prohibited, discouraged or restricted most offender characteristics even as grounds for

²⁶ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988).

²⁷ *Id.* at 18-20, 23.

²⁸ 3/16/06 Commission Testimony, *supra* note 9, at 18.

²⁹ See U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b); U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (October 2003) (hereinafter “2003 Downward Departure Report”), <http://www.ussc.gov/departtrpt03/departtrpt03.pdf>.

³⁰ S. Rep. No. 98-225, 98th Cong., 1st Sess. 172-175 (1984).

³¹ Breyer, *supra* note 26 at 19-20; Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 *5 (Jan./Feb. 1999).

³² *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter “Measuring Recidivism”), http://www.ussc.gov/publicat/Recidivism_General.pdf; *Recidivism and the First Offender* (May 2004) (hereinafter “First Offender”), http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf; *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005) (hereinafter “Salient Factor Score”), <http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf>.

downward departure, contrary to past practice,³³ beyond what Congress directed,³⁴ and beyond what the original Commission intended.³⁵ Not surprisingly, most judges surveyed in 2002 said that the guidelines infrequently met the goal of maintaining sufficient flexibility to permit individualized sentences, or of providing needed training, care or treatment in the most effective manner.³⁶

On the other hand, the guidelines require rigid arithmetic increases for a vast and complicated array of aggravating offense characteristics. They purport to make relevant distinctions based on quantifiable “harms,” while disregarding, restricting or prohibiting consideration of factors that bear on personal culpability, such as *mens rea*, motive, mistake and mental and emotional problems.³⁷ This works in one direction, as intended “harms” increase the sentence whether or not they occurred,³⁸ while “harms” that were unintended, unknown, fortuitous, or arranged by law enforcement are often counted.³⁹ The

³³ Breyer, *supra* note 26, at 19.

³⁴ Congress directed the Commission to assure that the guidelines were “entirely neutral” as to race, sex, national origin, creed, and socioeconomic status, and to reflect the “general inappropriateness” of education, vocational skills, employment record, family ties, community ties. See 28 U.S.C. §§ 994(d), (e). The Commission has prohibited consideration of drug or alcohol dependence and gambling addiction, §5H1.4, lack of guidance as a youth and similar circumstances indicating a disadvantaged background, § 5H1.12, personal financial difficulties or economic pressures on a trade or business, § 5K2.12, diminished capacity if the offense involved a threat of violence or was caused by voluntary use of drugs or other intoxicants, § 5K2.13, post-sentencing rehabilitation, § 5K2.19, a single aberrant act if the defendant had any “significant prior criminal behavior” even if so remote or minor that it was uncouneted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum, § 5K2.20; has strictly discouraged consideration of age, § 5H1.1, education and vocational skills, § 5H1.2, mental and emotional conditions, § 5H1.3, physical condition or appearance, § 5H1.4, employment record, § 5H1.5, family ties and responsibilities, § 5H1.6, and military, civic, charitable or public service, good works, § 5H1.11; and has erected multiple detailed requirements for consideration of victim’s conduct, § 5K2.10, lesser harms, § 5K2.11, coercion and duress, § 5K2.12, diminished capacity, § 5K2.13, voluntary disclosure, § 5K2.16, and aberrant behavior, § 5K2.20.

³⁵ See U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b) (1988) (“With [the] specific exceptions” of § 5H1.10 (race, sex, national origin, creed, religion, socio-economic status), the third sentence of § 5H1.4 (drug dependence or alcohol abuse), and the last sentence of § 5K2.12 (personal financial difficulties and economic pressures on a trade or business), “the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.”).

³⁶ U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapter II, available at <http://www.ussc.gov/judsurv/judsurv.htm>.

³⁷ *E.g.*, §§ 5H1.4, 5H1.12, 5K2.12, 5K2.13; § 2K2.1, comment. (n.16) (enhancement for stolen firearm or obliterated serial number regardless of knowledge or reason to believe the firearm was stolen or had an obliterated serial number); § 2J1.2 (12 level increase for false or misleading statement in connection with terrorism investigation regardless of whether the defendant knew it was a terrorism investigation).

³⁸ See § 1B1.3(a)(3) (“all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) . . . and all harm that was the object of such acts and omissions”); § 2D1.1, comment. (n.12) (total quantity attempted or agreed upon).

³⁹ *E.g.*, guidelines cited in note 37, *supra*; *United States v. Velasquez*, 28 F.3d 2 (2d Cir. 1994) (rejecting courier’s argument that the weight of the heroin in her shoes was unforeseeable because foreseeability limitation applies only to drugs possessed or distributed by others); § 2D1.1, comment. (n.12) (burden on defendant to establish that he did not intend or was not capable of producing quantity agreed upon in reverse sting); *United States v. Emmenegger*, 329 F.Supp.2d 416, 427-28 (S.D.N.Y. 2004) (amount of loss involved in the fraud in many cases “is a kind of accident” and thus “a relatively weak indicator of the

Commission “has never explained the rationale underlying any of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic.”⁴⁰

The one exception to the general rule against consideration of reduced personal culpability, role in the offense, is dwarfed by both the size of quantity-based aggravating factors and the large number of cumulative and often duplicative additional upward adjustments. The Commission limited the mitigating role adjustment to four levels because otherwise, guideline sentences might conflict with mandatory minimum sentences in some drug cases.⁴¹ This is one example of how the drug trafficking guideline has driven up sentences in all cases, for reasons divorced from sentencing purposes, and there are others. See Part II(D), *infra*.

C. Two Decades of the One-Way Upward Ratchet

The original Commission estimated that its own policy decisions, as distinct from congressional mandates, would increase the prison population by 10% over ten years.⁴² Since then, the Commission has amended the guidelines nearly 700 times, only a handful of which sought to reduce sentence severity.⁴³ By 2002, the guidelines alone (independent of mandatory minimum laws) accounted for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and the doubling of sentences for firearms trafficking and illegal firearms possession.⁴⁴ “Many offenses not subject to minimum penalty statutes have shown severity increases similar to offenses that are subject to statutory minimums.”⁴⁵ The federal prison population has more than quadrupled since the guidelines became law,⁴⁶

moral seriousness of the offense or the need for deterrence.”).

⁴⁰ Jose Cabranes & Kate Stith, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 69 (1998).

⁴¹ Fifteen Year Report at 49.

⁴² U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(g) (1988).

⁴³ I count seven areas in which the Commission has attempted to or did reduce sentence severity. The Commission lessened the impact of “mixture or substance” in cases involving marijuana plants in 1991, see U.S.S.G., App. C, Amend. 396, and in cases involving LSD in 1993. See U.S.S.G., App. C, Amend. 488. In 1995, the Commission passed an amendment that would have reduced the 100:1 powder to crack ratio to 1:1 but was not passed by Congress; in 1997 and 2002, it recommended reducing the ratio without offering an amendment. In 1995, at Congress’ direction, the Commission provided a two-level reduction for some offenders meeting safety valve criteria, expanded it to all qualified offenders in 2001, capped the quantity-based offense level at 30 for those who receive a mitigating role adjustment in 2002, but then increased the cap to 30, 31, 33, or 34 depending on the offense level, based on “concerns” about “proportionality” in 2004. See U.S.S.G., App. C, Amend. 515, 624, 640, 668. In 2000, the Commission provided a two-level reduction in intellectual property cases if the offense as not committed for commercial advantage or private financial gain, since the NET Act of 1997 provided lower statutory penalties in those cases. See U.S.S.G., App. C, Amend. 590. In 2001, the Commission reduced the enhancement for some aggravated felonies in § 2L1.2 from 16 to 12 or 8 levels, see U.S.S.G. App. C., amend. 632, and revised the money laundering guidelines by calibrating sentences to the seriousness of underlying criminal conduct. See U.S.S.G. App. C., amend. 634.

⁴⁴ Fifteen Year Report at 53-54, 64, 67, 139.

⁴⁵ *Id.* at 138.

⁴⁶ The federal prison population was 44,408 in 1986, 48,300 in 1987, see Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics – 1988* Table 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989, and is almost 190,000 today. See <http://www.bop.gov/news/quick.jsp#1>.

at a cost of \$4.5 billion per year.⁴⁷ As of 2004, the Bureau of Prisons was 40% overcapacity,⁴⁸ despite Congress' directive "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."⁴⁹

In 1999, Commission staff reported that average time served had doubled since the guidelines' inception, noted evidence that lengthy prison terms were being served by offenders with little risk of recidivism and without deterrent value, and recommended an evaluation of whether prison resources were being used effectively.⁵⁰ That same year, Justice Breyer gave a speech in which he criticized the "false precision" created by the guidelines, and called upon the Commission to "know when to stop," to "act[] forcefully to diminish significantly the number of offense characteristics," to "broaden[] the scope of certain offense characteristics, such as 'role in the offense,'" and to move in the direction of "greater judicial discretion" in order to provide "fairness and equity in the individual case."⁵¹ Instead, the Commission has continued to amend the guidelines in a "one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules."⁵²

Just three months before the Commission announced that the guidelines are a "mirror image" of 18 U.S.C. § 3553(a), its Fifteen Year Report acknowledged that much of the ever-increasing severity of the guidelines was due to real or perceived political pressure, admitted that it *still* had not determined whether the guidelines' increased severity achieves sentencing purposes, and suggested that penalties *could be* reduced to better achieve sentencing purposes and to relieve prison overcrowding.⁵³

Judges, past Commissioners, Commission staff, former prosecutors and academics have

⁴⁷ *FY 2004 Costs of Incarceration and Supervision*, The Third Branch, Vol. 37, No. 5 (May 2005) (\$23,205.59 per inmate in FY 2004), available at <http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html>.

⁴⁸ U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

⁴⁹ 28 U.S.C. § 994(g).

⁵⁰ Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999).

⁵¹ Breyer, *supra* note 31, at **10-11.

⁵² See Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005). See also Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999).

⁵³ Fifteen Year Report at 77, 137-140, Executive Summary at vi, xvii. See also the following articles cited in the Fifteen Year Report at 138, which recount a history of the Commission acting in response to pressure from law-and-order interests within and outside the Commission, rather than data and the purposes of sentencing. See Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289 (1989); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001 (2001); Aaron Rappaport, *The State of Severity*, 12 Fed. Sent. R. 3 (July/August 1999); Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines, Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001).

persistently criticized the guidelines' disproportionate severity, ineffectiveness and inefficiency.⁵⁴ Most recently, the Justice Kennedy Commission, Justice Kennedy himself, and the Constitution Project's bipartisan Sentencing Initiative, have called upon the Commission to reduce guideline sentences because they are unjust, ineffective, and inefficient.⁵⁵

Given the vast array of aggravating factors, the over-emphasis on quantity-based "harms," and the neglect of personal culpability and other mitigating factors, the guideline sentence is very likely to be greater than necessary to satisfy sentencing purposes in most cases. Likewise, it should be very difficult for the government to argue, or the sentencing court to find, that the guideline range fails to take account of any aggravating factor or is insufficient to satisfy sentencing purposes.⁵⁶

D. Unwarranted Disparity and Excessive Uniformity Fostered by the Guidelines

After *Booker*, the government and many courts cite the need for "uniformity" to justify *de facto* mandatory guidelines. One answer to this is that the Supreme Court ruled in *Booker* that "the uniformity that Congress originally sought to secure . . . is no longer an open choice" under the Sixth Amendment.⁵⁷ However, many courts are unmoved by this basic constitutional point, and seem to believe that the guidelines actually reflect the kind of uniformity the original Congress sought to secure and actually avoid unwarranted disparity. In fact, the guidelines reflect an excessive uniformity and rigidity that Congress did not intend, and have fostered unwarranted disparity. Justice Breyer knows this, as evidenced by his 1999 speech. See Part I(C), *supra*. That presumably is why, in *Booker*, he urged the Commission to "modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices," in order to "thereby promote uniformity in the sentencing process."⁵⁸

⁵⁴ *E.g.*, Fifteen Year Report at 50, 52, 55, 82, 137; Frank O. Bowman III, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 165-66 & nn. 105-06 (2005); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 24, 33-35, 68-73 (2003); Breyer, *supra* note 31 at **10-11; Michael Tonry, *Sentencing Matters* 78-79 (Oxford 1996); U.S. Sentencing Commission, *White Collar Working Group Report* 8 (April 1993); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992); U.S. Sentencing Commission, *Report of the Drugs/Role/Harmonization Working Group* 60 (Nov. 10, 1992); United States General Accounting Office, *Report to Congressional Committees, Sentencing Guidelines: Central Questions Remain Unanswered* at 151-52 (August 1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 921 (1991).

⁵⁵ Report of the ABA Justice Kennedy Commission, Summary of Recommendations, <http://www.abanet.org/media/kencomm/summaryrec.pdf>; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html; Constitution Project, Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 32-34 (June 7, 2005).

⁵⁶ *E.g.*, *United States v. Zapete-Garcia*, 447 F.3d 57 (1st Cir. 2006) (reversing upward variance because guidelines already took reasons into account); *United States v. Kendall*, 446 F.3d 782 (8th Cir. 2006) (same).

⁵⁷ *Booker*, 543 U.S. at 263-64.

⁵⁸ *Id.* at 263.

1. The guidelines preclude the “comprehensive examination of the particular offense and offender” intended by Congress to avoid *unwarranted* disparity.

Congress directed the Commission to “avoid[] unwarranted disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.”⁵⁹ As the 1977 Senate Judiciary Committee Report explained, “the key word in discussing unwarranted sentence disparities is ‘unwarranted’” and the “Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records.”⁶⁰

As the 1983 Senate Judiciary Committee Report explained: “The Committee does not intend that the Guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the Guidelines in an appropriate case. The purpose of the Sentencing Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. . . . [T]he judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. . . . This will assure that the . . . sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.”⁶¹

Since the Sentencing Reform Act was enacted, the Commission has eliminated any “comprehensive examination of the characteristics of the particular offense and the particular offender,” and hence “informed comparisons” among cases. Using the guidelines as the benchmark of disparity is therefore contrary to congressional intent even under the original SRA.

2. Unwarranted disparity is built into the guidelines.

The Commission acknowledges that it has “only partially achieved” the goal of avoiding unwarranted disparities while maintaining sufficient flexibility to permit warranted differences.⁶² Many observers say it has utterly failed.⁶³ Unwarranted disparity and unwarranted uniformity, two sides of the same coin, are discussed in the context of particular guidelines in Part II, *infra*. This section discusses rules that the Commission has found to produce racial disparity without serving sentencing purposes (regardless of the defendant’s race), and the persistence of and increase in regional disparity under the guidelines primarily as a result of prosecutorial practices. Insistence on following the guidelines in order to achieve national uniformity perpetuates the unwarranted disparity built into the guidelines.

a. Rules that do not serve sentencing purposes but create racial disparity.

According to the Fifteen Year Report, racial disparity is “built into the sentencing rules themselves rather than a product of . . . discrimination on the part of judges. . . . [The] increasingly severe treatment of

⁵⁹ 28 U.S.C. § 991(b)(1)(B).

⁶⁰ S. Rep. No. 95-605 at 1161 (1977).

⁶¹ S. Rep. No. 98-225, 98th Cong., 1st Sess. 52-53 (1984).

⁶² Fifteen Year Report at 142-143.

⁶³ *E.g.*, Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 *Stan.L.Rev.* 85 (2005); Michael O’Hear, *The Myth of Uniformity*, 17 *Fed. Sent. Rep.* 249, 2005 WL 2922200 (April 2005).

. . . particularly, drug offenses and repeat offenses, has widened the gap. . . . Today's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."⁶⁴

The sentencing disparity between white and minority offenders, which was small in the pre-guideline era, has widened considerably since the guidelines went into effect. By 1994, the number of months of imprisonment for Black offenders was nearly double that for whites, and has narrowed only slightly since then.⁶⁵ "A significant amount of the gap" is due to "the adverse impact of current cocaine sentencing laws" and "the harsher treatment of drug trafficking, firearm, and repeat offenses."⁶⁶

Rules identified by the Commission that create racial disparity but are not a "necessary and effective means to achieve the purposes of sentencing" are mandatory minimum penalties, 924(c) enhancements, the drug trafficking guidelines, the relevant conduct rules, the 100:1 powder to crack ratio, the career offender guideline, and the inclusion of non-moving traffic violations and other minor offenses in the criminal history score.⁶⁷

b. Unwarranted regional and racial disparity resulting from the government's unreviewable discretion.

Regional disparity persists under the guidelines, and has even increased for drug trafficking offenses.⁶⁸ Considerable regional variation results from "uneven charging and plea bargaining" in the filing of § 851 notices, § 924(c) charges, and mandatory minimum charges, the use of fast track dispositions, and motions under U.S.S.G. § 5K1.1, § 3E1.1(b), 18 U.S.C. § 3553(e) and Rule 35(b).⁶⁹ Prosecutorial "charging decisions disproportionately disadvantage minorities."⁷⁰

"Among discretionary mechanisms within the guidelines system, substantial assistance departures contribute the greatest amount to variation in sentences."⁷¹ Rates vary widely among districts, and research shows that African American offenders consistently receive substantial assistance departures at a lower rate.⁷² The Commission has concluded that "factors . . . associated with either the making of a §5K1.1 motion and/or the magnitude of the departure were not consistent with principles of

⁶⁴ Fifteen Year Report at 135.

⁶⁵ *Id.* at 115-16, 120-27.

⁶⁶ *Id.* at 117.

⁶⁷ *Id.* at 47-55, 76, 113-14, 131-134, 141. See also U.S. Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* (May 2002) (hereinafter "2002 Cocaine Report"); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 29, 1997); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (February 1995), all available at <http://www.ussc.gov/reports.htm>; U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991) (hereinafter "1991 Mandatory Minimum Report"), http://www.ussc.gov/r_congress/MANMIN.PDF.

⁶⁸ Fifteen Year Report at 94, 98, 140.

⁶⁹ *Id.* at 84-85, 89-92, 102, 103, 106, 111-12, 141-42.

⁷⁰ *Id.* at 91.

⁷¹ *Id.* at 102, 141.

⁷² *Id.* at 103-05, 141.

equity.” Legally irrelevant factors including race, gender, ethnicity and citizenship are “statistically significant in explaining §5K1.1 departures,” while legally relevant factors such as the type or benefit of cooperation, defendant culpability and offense type “generally were found to be inadequate in explaining §5K1.1 departures.” The government’s reasons for making or withholding substantial assistance departures are not made available for review. “It is exactly such a lack of review, inherent in preguideline judicial discretion, that led to charges of unwarranted disparity and passage of the SRA.”⁷³

Note that after *Booker*, courts may consider cooperation without a government motion, though it may invite a government appeal. The government has argued that this is contrary to congressional intent, but the guidelines, not the statute, require a government motion (except to get below a mandatory minimum).⁷⁴ The Eleventh Circuit has held that judges may not consider cooperation without a government motion,⁷⁵ the Second Circuit has held that judges may where the defendant’s cooperation or efforts to cooperate are relevant to the defendant’s character (e.g., remorse and rehabilitation), and the purposes of sentencing (e.g., the likelihood of rehabilitation, the necessity for individual deterrence, a reduced need for punishment),⁷⁶ and the Eighth Circuit has held that they may and even must to correct unwarranted disparity between co-defendants.⁷⁷

E. Politically Unaccountable

The Tenth Circuit recently attempted to reconcile the inconsistency between the “democratic spirit” of the Sixth Amendment and the use of “presumptively reasonable” guidelines without a right to jury trial by claiming that the Sentencing Commission is a “politically accountable body” and the guidelines “are an expression of popular political will.”⁷⁸

The Sentencing Commission is the least politically accountable of all administrative agencies, which explains why the guidelines bear so little resemblance to their enabling legislation.⁷⁹ The Commission’s proposed amendments are subject to a notice and comment period,⁸⁰ but not to the other requirements of the Administrative Procedures Act, most notably judicial review. The Commission deliberates in secret, its actions need not be rational or justified on the basis of a record, and it need not even address issues raised in public comment. It rarely attempts to justify guideline amendments, and

⁷³ U.S. Sentencing Commission, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998).

⁷⁴ Compare U.S.S.G. § 5K1.1 (government motion required) with 28 U.S.C. § 994(n) (no mention of government motion) with 18 U.S.C. § 3553(e) (government motion required for departure below mandatory minimum).

⁷⁵ *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005).

⁷⁶ *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006).

⁷⁷ *United States v. Krutsinger*, 449 F.3d 827 (8th Cir. 2006); *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006).

⁷⁸ *United States v. Cage*, 451 F.3d 585 (10th Cir. 2006).

⁷⁹ Joseph W. Luby, *Reining in the “Junior Varsity Congress”: A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U. L.Q. 1199, 1228 (1999); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Cal. L. Rev. 1, 5 (1991); Stith & Cabranes, *supra* note 40, at 57.

⁸⁰ 28 U.S.C. § 994(x).

what explanations it gives are conclusory and inadequate.⁸¹ While the Commission is required to consult with “authorities on, and individual representatives of the Federal criminal justice system,” including the judiciary and the defense bar,⁸² input that conflicts with the wishes of DOJ is usually ignored.⁸³ Moreover, DOJ, which has an *ex officio* representative on the Commission, and other law enforcement agencies, communicate with the Commission in secret.⁸⁴ Other stakeholders cannot respond to these communications, rendering the notice and comment period ineffective.

F. Contrary to Public Opinion

In a related vein, it has been suggested that the guidelines should be given heightened deference after *Booker* based on a public opinion poll conducted by Professors Rossi and Berk under contract with the Sentencing Commission in the mid-1990s,⁸⁵ which purportedly showed a “fair amount of agreement between sentences prescribed in the guidelines and those desired by the members of the sample.”⁸⁶

As the original Commission recognized, public opinion polls are an inherently poor way to set or measure sentencing policy.⁸⁷ In any event, the Rossi and Berk study showed significant disagreement on the part of survey respondents with the severity of sentences produced by the most frequently applied guidelines, even before the further increases over the past ten years. Among other things, the guidelines produced “much harsher” sentences in drug trafficking cases than survey respondents would have given. Respondents did not support the drastic increases under “habitual offender” rules like the career offender guideline. Respondents gave less weight to economic loss than the guidelines did, and less severe sentences for immigration offenses, bribery, civil rights offenses and environmental crimes.⁸⁸

II. The Most Frequently Applied Guidelines Produce Sentences that are Greater Than Necessary to Satisfy Sentencing Purposes.

The following are some of the ways in which the most frequently applied guidelines fail to satisfy sentencing purposes and create unwarranted disparity.

⁸¹ Miller & Wright, *supra* note 52, at 802-803; Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 390 (2004); Stith & Cabranes, *supra* note 40, at 69.

⁸² 28 U.S.C. § 994(o).

⁸³ *E.g.*, Bowman, *supra* note 52, at 1336-1341.

⁸⁴ U.S. Sentencing Commission, Rules of Practice and Procedure, Rules 3.3, 5.1, available at http://www.ussc.gov/general/rules11_01.pdf.

⁸⁵ Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes (1997) (hereinafter “Rossi & Berk”), http://www.ussc.gov/nss/jp_exsum.htm.

⁸⁶ *United States v. Wilson*, 350 F.Supp.2d 910, 917 (D. Utah 2005).

⁸⁷ Breyer, *supra* note 26, at 16 & n.84. See also Michelle D. St. Armand & Edward Zamble, *Impact of Information About Sentencing Decisions on Public Attitudes Toward the Criminal Justice System*, 25 L. & Hum. Behav. 515, 516-17, 525 (2001) (research shows that when surveyed in the abstract, respondents “tend to think of hardened and vicious criminals rather than the typical offender,” and that severity of sentences reported in the news conditions attitudes about sentence length).

⁸⁸ Rossi & Berk, *supra* note 85.

A. “Real Conduct”

As several commentators and some judges have observed, the *Booker* remedy is internally inconsistent (in throwing out mandatory guidelines in favor of the “uniformity” achieved by “real conduct” found on the basis of presentence reports) and did not address the constitutional violation (“remedying” judicial factfinding with judicial factfinding), all in pursuit of preserving the “real conduct” sentencing that invited the constitutional holding.⁸⁹ The problem boils down to a fundamental disagreement over how “real conduct” sentencing works in practice and its implications for our constitutional structure. The fate of *de facto* mandatory guidelines will likely depend on whether Justice Breyer can again “scrape together” a majority for his view.⁹⁰

The five justices in the majority in *Blakely* and in the constitutional majority in *Booker* (Stevens, Scalia, Souter, Thomas and Ginsburg, all still on the Court) were deeply disturbed that the guidelines required the equivalent of conviction for uncharged, dismissed and acquitted crimes without the fundamental components of the adversary system the Framers intended, *i.e.*, notice, jury trial, and proof beyond a reasonable doubt.⁹¹ They held that “real conduct” sentencing is an “assault” on the Sixth Amendment’s “fundamental reservation of power” in the people within “our constitutional structure.”⁹² “The jury could not function as circuitbreaker in the State’s machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.”⁹³ If the Sixth Amendment issue had been raised in *Witte v. United States*, 515 U.S. 389 (1995) (upholding uncharged conduct against double jeopardy challenge) and *United States v. Watts*, 519 U.S. 148 (1997) (upholding acquitted conduct against double jeopardy challenge), these justices would have decided those cases differently.⁹⁴ Further, these justices are aware that the “facts” of uncharged, dismissed and acquitted offenses are determined unfairly and unreliably, *i.e.*, without notice by indictment or plea, based on “hearsay-riddled presentence reports” prepared by probation officers who the judge thinks “more likely got it right than got it wrong.”⁹⁵ This “non-adversarial” truth-seeking process” is “an assault on jury trial generally.”⁹⁶

In contrast, Justice Breyer describes “real conduct” as merely about the “way in which” the offense of conviction was committed. In his view, stunningly uninformed by actual practice over the past twenty

⁸⁹ Michael W. McConnell, *The Booker Mess*, 83 *Denver U. L. Rev.* 665 (2006); David J. D’Addio, *Sentencing After Booker: The Impact of Appellate Review on Defendants’ Rights*, 24 *Yale L. & Pol’y Rev.* 173 (2006); Frank O. Bowman, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 *Chi. Legal F.* 149, 182 (2005); 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, 564 (2005); *Kandirakis*, 2006 WL 2147610 at **4-11.

⁹⁰ *Id.* at *13.

⁹¹ See *Blakely*, 542 U.S. at 306 (not even *Apprendi*’s critics can support the “absurd result” of a man being sentenced “for committing murder, even if the jury convicted him only of possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene”); *id.* at 307 (*Blakely* was sentenced based on the “very charge” that was dismissed pursuant to his guilty plea); *Booker*, 543 U.S. at 273 (noting that *Booker* was sentenced on the basis of uncharged crimes) (Stevens, J., dissenting in part).

⁹² *Blakely*, 542 U.S. at 305-08, 313.

⁹³ *Id.* at 307 (emphasis in original).

⁹⁴ *Booker*, 543 U.S. at 240.

⁹⁵ *Id.* at 304 (Scalia, J., dissenting in part); *Blakely*, 542 US at 311-12.

⁹⁶ *Blakely*, 542 U.S. at 312-13.

years, “real conduct” sentencing is based on “factual information” contained in a “presentence report” which is “uncovered after trial,” is determined “fairly” by probation officers, avoids the transfer of power from judges to prosecutors, and somehow avoids unwarranted disparity better than would adversarial testing before a jury.⁹⁷ Though Justice Ginsburg inexplicably signed on to this description in the remedy opinion, her dissent in *Recuenco*, *supra*, indicates that her position on “real conduct” sentencing under a *de facto* mandatory guideline system has not changed.

As Justice Stevens observed, “the [remedy] majority’s concerns about relevant conduct are nothing more than an objection to *Apprendi* itself, an objection this Court rejected in Parts I-III. . . . [T]he goal of such sentencing-increasing a defendant’s sentence on the basis of conduct not proved at trial-is contrary to the very core of *Apprendi*.”⁹⁸

Justice Breyer’s arguments are no more than wishful policy theories that can easily be discredited based on the Commission’s own studies, critiques by experts in the field, and the facts of typical cases.⁹⁹ He has never confronted the fact that the guidelines’ relevant conduct rules go well beyond facts about “the way in which” the offense of conviction was committed to full-blown separate offenses.¹⁰⁰ The Commission characterizes these rules, which *were not required or even suggested by Congress*, as “an admitted policy compromise.”¹⁰¹ The “compromise” was radical and one-sided. As Commission staff have pointed out, unlike some state guideline systems that permit the use of *some* facts beyond the offense of conviction and only within a grid that caps the sentence based on the offense of conviction, under the federal guidelines, separate offenses of which the defendant was never charged or convicted add to the sentence at the same rate as if the defendant was charged and convicted.¹⁰² Further, the most frequently applied guidelines (drugs, economic crimes, firearms) require inclusion of uncharged, dismissed and acquitted offenses. And the guidelines now contain nearly 100 cross references to more serious offenses, the application of which often results in the equivalent of conviction for offenses over which the federal courts have no jurisdiction. Before and after *Booker*, defendants are regularly convicted of separate and greater crimes, without notice, jury trial, admissible evidence, or proof beyond a reasonable doubt, or contrary to the jury’s verdict.¹⁰³

⁹⁷ *Booker*, 543 U.S. at 250-57, 326, 327-29.

⁹⁸ *Id.* at 288 (Stevens, J., dissenting in part).

⁹⁹ See examples in the Appendix to Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission (July 19, 2006), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/defender_letter_to_ussc_71906.pdf.

¹⁰⁰ *United States v. Faust*, ___ F.3d ___, 2006 WL 2035467 **5-10 (11th Cir. July 21, 2006) (sentencing on the basis of acquitted facts that “constitute entirely free-standing offenses under the applicable law” violates the Fifth and Sixth Amendments) (Barkett, J., specially concurring).

¹⁰¹ Fifteen Year Report at 144.

¹⁰² U.S. Sentencing Commission, *Relevant Conduct and Real Offense Sentencing* (Staff Discussion Paper, 1996), <http://www.ussc.gov/SIMPLE/relevant.htm>.

¹⁰³ *E.g.*, *Faust*, 2006 WL 2035467 (possession of ecstasy and possession of a firearm of which defendant was acquitted were merely about the “manner in which” he committed cocaine trafficking offense of which he was convicted); *United States v. Rashaw*, 170 Fed. Appx. 986 (8th Cir. 2006) (affirming statutory maximum sentence of 30 years for defendant convicted of firearms offenses based on uncharged double homicide to which firearms were unrelated); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005) (affirming 360-month sentence for defendant convicted of drug trafficking offense subject to 27-33 month guideline sentence based on conduct of others in conspiracy of which he was acquitted); *United States v. Jardine*, 364 F.3d 1200 (10th Cir. 2004) (affirming 108-month sentence for defendant convicted of firearms possession subject to 18-24 month guideline sentence based on uncharged drug trafficking offense to which the firearm was unrelated); *United States v. Lombard*, 102 F.3d 1 (1st Cir. 1996) (affirming life

Also contrary to Justice Breyer's portrayal, the Commission and many experts have found that the relevant conduct rules result in unfairness and inaccuracy, and have not avoided unwarranted disparity or the transfer of power to prosecutors, but just the opposite: First, the "real conduct" system results in the equivalent of conviction based on facts that often are not real at all. According to the Commission, "research suggested significant disparities in how [the relevant conduct] rules were applied," and "questions remain about how consistently it can be applied," given that "disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators."¹⁰⁴ Most probation officers incorporate the prosecutor's written version of the facts or law enforcement reports directly into the PSR.¹⁰⁵ In some circuits, the mere inclusion of factual allegations in a PSR transforms them to "evidence," which relieves the government of introducing actual evidence and shifts the burden to the defendant to disprove it.¹⁰⁶

"In truth, 'real conduct' sentencing as embodied in the Guidelines, is simply punishment for acts not constitutionally proven. The system relies on 'findings' that rest on 'a mishmash of data[,] including blatantly self-serving hearsay largely served up by the Department [of Justice]. If the Sentencing Reform Act 'depends for its success upon judicial efforts to' administer this scheme and its faux findings, then the Act's success ought not to be desired."¹⁰⁷ The *Booker* remedy "continues to provide safe harbor for the imaginative fantasies of what really occurred under the rubric of real conduct."¹⁰⁸

Second, "real conduct" is the source of disproportionate severity and unwarranted uniformity. It exacerbates the guidelines' over-emphasis on quantity and neglect of personal culpability, creating sentences that are vastly disproportionate to culpability and resulting in unwarranted uniformity among unlike offenders.¹⁰⁹ In drug cases, it punishes offenders in excess of Congress' intent in enacting the mandatory minimum statutes of focusing on major and serious traffickers based on quantities possessed, controlled, directed or handled by the individual defendant in the offense of conviction. See IV(B), *infra*.

sentence for defendant convicted of firearms offense based on a murder of which he was acquitted in state court); *United States v. Vernier*, 335 F. Supp.2d 1374 (S.D. Fla. 2004) (departing upward from sentence based on conviction of fraudulent money withdrawal based on suspicion of uncharged murder), *aff'd in part, vacated in part on other grounds*, 152 Fed. Appx. 827 (11th Cir. Oct. 11, 2005).

¹⁰⁴ Fifteen Year Report at 50. See also David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 S.M.U. L. Rev. 211, 222 (2004) (discussing "increase in 'dry conspiracies' where no drugs were ever seized by the police and the conviction and sentence depended entirely on the dubious testimony of cooperating witnesses, even when many of these had been higher up in the chain than the defendant on trial.").

¹⁰⁵ Fifteen Year Report at 84, 86; Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission, Memorandum at 21 (July 19, 2006), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/defender_letter_to_ussc_71906.pdf.

¹⁰⁶ See *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990).

¹⁰⁷ *Kandarakis*, 2006 WL 2147610 at *13 (citations omitted).

¹⁰⁸ Dan Markel, *The Indispensable Berman on Booker*, June 26, 2006, available at http://prawfsblawg.blogs.com/prawfsblawg/2006/06/the_indispensab.html.

¹⁰⁹ Fifteen Year Report at 50, 52. See also, e.g., Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 32-34 (June 7, 2005).

Further, concepts of “foreseeability” and “jointly undertaken activity” are applied in a manner that obliterates important distinctions in culpability.¹¹⁰ Third, “real conduct” results in unwarranted disparity. It is not consistently applied because of “ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result.”¹¹¹ In a sample test administered by Commission researchers for the Federal Judicial Center, probation officers applying the relevant conduct rules sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant.¹¹²

Prosecutors, judges and defense counsel circumvent the rules because they feel they are unjust.¹¹³ Circumvention can result in sentences that “are better suited to achieve the purposes of sentencing than the sentence that would result from strict adherence to every applicable law,” but those decisions are controlled by prosecutors and only benefit some defendants and not others. This results in unwarranted disparity and sentences that are often disproportionate to the seriousness of the offense.¹¹⁴

Fourth, “real conduct” transfers power to prosecutors, not away from them. The relevant conduct rules and cross references were based on concerns that a charge system would transfer power to prosecutors and thereby increase disparities,¹¹⁵ but, since prosecutors control the “facts,” the rules “are not working as intended,” and “tend to work in one direction,” *i.e.*, to the disadvantage of defendants.¹¹⁶ Rather than preventing prosecutors from controlling sentencing outcomes, “real conduct” has transferred sentencing power to prosecutors.¹¹⁷

The relevant conduct rules invite prosecutors to obtain, or threaten to obtain, the equivalent of a conviction on charges that cannot be proved with competent evidence but are impossible to challenge. If the charges were brought, the defendant would have notice, discovery, and the right to cross-examination and proof beyond a reasonable doubt. If charges are not brought or dropped, they can be “proved” in a presentence report. The government need not produce the purported source of the information in court, the defendant has no right to cross-examine the purported source, and often the source is not even identified. In this way, the burden is effectively or explicitly shifted to the defendant. If the defendant contests the allegations, he may lose an acceptance of responsibility reduction and even receive an enhancement for obstruction of justice.¹¹⁸ Thus, “real conduct” makes it far easier to obtain the equivalent

¹¹⁰ Stephen J. Schulhofer, *Excessive Uniformity and How to Fix It*, 5 Fed. Sent. Rep. 169, 1992 WL 439725 **2-3 (Nov./Dec. 1992).

¹¹¹ Fifteen Year Report at 87.

¹¹² See Lawrence & Hofer, *supra* note 109.

¹¹³ Fifteen Year Report at 32, 87.

¹¹⁴ *Id.* at 82, 141-42.

¹¹⁵ *Id.* at 25-27.

¹¹⁶ *Id.* at 92.

¹¹⁷ *Id.* at 86; Constitution Project’s Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 33 (June 7, 2005).

¹¹⁸ Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 Cal. L. Rev. 425 (2004).

of a conviction than to bother with the adversarial testing the Framers had in mind.¹¹⁹ With this awesome power in hand, prosecutors can and do extract agreements to dubious enhancements or guilty pleas from defendants who would otherwise be acquitted.¹²⁰ “The inducement to plead guilty may be irresistible even to a defendant with a strong defense or who is actually innocent.”¹²¹

B. Drug Offenses

Increased sentence length for drug offenses has been “the major cause of federal prison population growth” since the guidelines’ inception, and a “primary cause” of racial disparity in sentencing.¹²² The Commission rightfully has condemned mandatory minimum penalties for creating disproportionate severity, unwarranted uniformity, and unwarranted disparity,¹²³ but the Commission has unnecessarily exacerbated these problems. Since the early 1990s, the Commission has received a stream of evidence from its own research staff, other experts, judges, and even the Department of Justice and the Bureau of Prisons that the guidelines produce sentences in drug cases that are far greater than necessary to achieve sentencing purposes, result in unwarranted disparity, and require excessive uniformity.

Thirty-one percent of judges surveyed in 2002 listed drug sentencing as “the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing,” with “73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses.”¹²⁴ Before *Booker*, prosecutors and judges often circumvented the guidelines in drug cases to mitigate their harshness and inflexibility.¹²⁵ Judges can now correct what the Commission has not. After *Booker*, the rate of below-guideline sentences in all types of drug cases has increased markedly.¹²⁶

1. What Congress Intended

¹¹⁹ Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1714 (1992); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. Rev. 649, 670 (2003); 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, 569-71 (2005).

¹²⁰ Michael O’Hear, *The Original Intent of Uniformity in Sentencing*, 74 U. Cin. L. Rev. 749, 809 & n.304 (2006).

¹²¹ American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463, 1492-93 (2001). See also David Yellen, *Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 449 (1993); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 274 (1989).

¹²² Fifteen Year Report at 47-48, 76.

¹²³ *Id.* at 15, 22. See also 1991 Mandatory Minimum Report, *supra* note 67; 2002 Cocaine Report, *supra* note 67.

¹²⁴ Fifteen Year Report at 52, citing U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines* (Feb. 2003), available at <http://www.ussc.gov/judsurv/judsurv.htm>.

¹²⁵ Fifteen Year Report at 54-55. See also Frank O. Bowman and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 Iowa L. Rev. 477, 479-83 (January 2002).

¹²⁶ Booker Report at 128.

In enacting the Anti-Drug Abuse Act of 1986 (ADAA), Congress intended to create a two-tiered penalty structure aimed at “discrete categories of traffickers”: a ten-year mandatory minimum for “major” traffickers, *i.e.*, “manufacturers or the heads of organizations,” and a five-year mandatory minimum for “serious” traffickers, *i.e.*, “managers of the retail traffic.”¹²⁷ Congress selected quantities of particular drugs possessed, controlled, directed or handled by the defendant as a proxy to identify “major” and “serious” traffickers:

The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are *responsible for creating and delivering very large quantities of drugs*. After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if *possessed by an individual* would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that might be *controlled or directed by a trafficker in a high place* in the processing and distribution chain. . . . The Committee determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is *filling the bags* of heroin, *packaging crack* into vials or *wrapping pcg* in aluminum foil, and doing so *in substantial street quantities*.¹²⁸

A “major goal” of the legislation was “to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources.”¹²⁹ However, the quantities were set at such low levels that the majority of federal drug defendants are street-level dealers or mules.¹³⁰ Further, unlike the Parole Commission which set release dates based on the quantity of the pure drug, Congress used the weight of a “mixture or substance containing a detectable amount” of the drug.¹³¹

2. Severity Broadened and Increased by the Commission

The Sentencing Commission exacerbated the problems inherent in the statute in several ways.

First, the Commission extended the ADAA’s quantity-based approach across 17 levels, resulting in increased punishment below, between and above the statutory levels.¹³² This went “well beyond those judgments that flow naturally from deference to congressional decisions.”¹³³ The Commission gave no contemporaneous explanation for doing so, which “is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population.”¹³⁴

¹²⁷ 2002 Cocaine Report, *supra* note 67, at 5-7 (reviewing legislative history); Fifteen Year Report at 48-49 (same); 132 Cong. Rec. 27,193-94 (daily ed. Sept. 30, 1996); 132 Cong. Rec. 22,993 (daily ed. Sept. 11, 1986); H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596.

¹²⁸ H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background) (emphasis supplied).

¹²⁹ *Id.*

¹³⁰ Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 Vill. L. Rev. 383, 408-412 (1995).

¹³¹ Fifteen Year Report at 48.

¹³² *Id.* at 50.

¹³³ Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 853 (1992).

¹³⁴ Fifteen Year Report at 49.

Second, the Commission added a variety of aggravating factors that increase the guideline sentence above that dictated by quantity. Some of these double count aspects that Congress thought would be reflected in quantity, for example aggravating role in any type of drug case, presence of a weapon and use of a minor in crack cases.¹³⁵

Third, as noted above, the Commission decided not to give more weight to mitigating role in the offense and other potentially significant factors because if so, guideline sentences might conflict with mandatory minimum sentences in some cases.¹³⁶

Fourth, the Commission adopted a definition of “relevant conduct” that exceeds Congress’ intent to focus on major and serious traffickers based on quantities possessed, controlled, directed or handled by the individual defendant in the offense of conviction. It increases the sentence based on amounts involved in separate transactions of which the defendant was not convicted and amounts merely “reasonably foreseeable” to the defendant in “jointly undertaken criminal activity.” Application of the relevant conduct rule can exceed congressional intent even in transactions in which the defendant was involved and convicted. For example, a defendant who helped offload a single shipment can be sentenced “well in excess of the ten-year mandatory minimum penalty,” though “it cannot be said that Congress required . . . more than ten years imprisonment” in such a case.¹³⁷

The Commission’s actions resulted in prison terms “far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.”¹³⁸ The Commission initially estimated that the drug guidelines would add only one additional month to prison sentences, but as of 2001, over 25% of the average prison sentence for drug offenders was attributable to guideline increases above mandatory minimum penalties.¹³⁹

3. Severity Disproportionate to the Seriousness of the Offense, Unwarranted Uniformity, Unwarranted Disparity

By elevating the impact of quantity to the exclusion of offense circumstances and offender characteristics pertinent to personal culpability, the guidelines overstate the seriousness of the offense even from a pure “just deserts” perspective.¹⁴⁰ The quantity-driven rules “mandate inequity” and

¹³⁵ 2002 Cocaine Report, *supra* note 67, at 9-10.

¹³⁶ Fifteen Year Report at 49.

¹³⁷ U.S. Sentencing Commission, *Report of the Drugs/Role Harmonization Working Group 2-3* (Nov. 10, 1992) (hereinafter “1992 USSC Drug Report”).

¹³⁸ Fifteen Year Report at 49.

¹³⁹ *Id.* at 54.

¹⁴⁰ See Fifteen Year Report at 50 (quantity a “particularly poor proxy for the culpability of low-level offenders . . . who do not share in the profits or decision-making”); Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chic. L. Rev. 901 (1991) (guidelines disregard factors that are important from a just deserts perspective in favor of “harm” only because it is easier, on the surface, to quantify); Hofer & Lawrence, *An Empirical Study of the Application of the Relevant Conduct Guidelines § 1B1.3*, 4 Fed. Sent. Rep. 330, 1992 WL 195017 (May/June 1992) (sentences imposed are “vastly disproportionate to the defendant’s culpability” when based on amounts involved in a conspiracy in which the defendant played a minor part); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 851-57 (1992) (“Drug quantity, which should count as one among many sentencing factors, and not the most important one at that, becomes the only sentencing factor.”); 1992 USSC Drug Report, *supra* note 126, at 51 (discussing need for “a greater reduction for mitigating role”); Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission 2* (1995) (“[T]he Judicial Conference . . . encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually

“excessive uniformity” by “requiring that different cases be treated alike.”¹⁴¹ The rules make arbitrary distinctions among offenders, creating a false precision.¹⁴² It is doubtful that quantity can “be determined with sufficient precision to justify seventeen meaningful distinctions,” and “arbitrary variations due to the weight of inactive ingredients remain.”¹⁴³ Quantity “is often opportunistic,” and can result in “inequity and unfairness.”¹⁴⁴ Manipulation of sentencing factors by prosecutors and police (e.g., inducement to cook the powder, repeated transactions, transactions in a prohibited location) is a “significant source of continuing disparity in the federal system.”¹⁴⁵ As noted above, there are “significant disparities” in how the relevant conduct rules are understood and applied, and it is questionable that disputes over drug quantity could ever be consistently applied, since they “must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators.”¹⁴⁶ Inexplicably, the Commission has encouraged *upward* departure in the event drug quantity happens to understate offense seriousness, but has not invited *downward* departures,¹⁴⁷ though “these are the guidelines most in need of rationalizing interpretation.”¹⁴⁸

4. Ineffective Sentences Not Worth the Financial and Human Cost

Today, 55% of federal prisoners are serving time for a drug offense.¹⁴⁹ Contrary to congressional intent in enacting the ADAA, over 50% are in Criminal History Category I, and at least 83% had no weapon involvement.¹⁵⁰ Only 17.1% of federal cocaine traffickers are classified as high-level offenders, 70% are low-level, and the other 12.4% are in between.¹⁵¹ A study published by the Department of Justice in 1994 found that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system. Though these offenders “are much less likely than high-level defendants to re-offend” and “a short prison sentence is just as likely to deter them from future offending as a long prison sentence,” they “still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme.” DOJ concluded that the resources expended on these offenders “could be used more efficiently to promote

exclusively by the quantity or weight of the drugs involved”).

¹⁴¹ See Schulhofer, *supra* note 140, at 851-57. See also Alschuler, *supra* note 140, at 919-21 (guidelines require same treatment of a runner and his supplier); Steven B. Wasserman, *Toward Sentencing Reform for Drug Couriers*, 61 Brooklyn L. Rev. 643 (1995) (same regarding couriers).

¹⁴² Hofer & Allenbaugh, *supra* note 54, at 24.

¹⁴³ Fifteen Year Report at 50.

¹⁴⁴ 1992 USSC Drug Report, *supra* note 137, at 51, 60.

¹⁴⁵ Fifteen Year Report at 82.

¹⁴⁶ *Id.* at 50.

¹⁴⁷ *Id.*

¹⁴⁸ Hofer & Allenbaugh, *supra* note 54, at 79.

¹⁴⁹ The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005) (hereinafter “*Incarceration and Crime*”), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

¹⁵⁰ Fifteen Year Report at 54-55; U.S. Sentencing Commission, 2005 Sourcebook of Federal Sentencing Statistics, Tables 37, 39, available at <http://www.ussc.gov/ANNRPT/2005/SBTOC05.htm>.

¹⁵¹ 2002 Cocaine Report, *supra* note 67, at 39.

other criminal justice needs."¹⁵² A recidivism study published by a Bureau of Prisons researcher in 1994 concluded that for the 62.3% of federal drug trafficking prisoners who at that time were in Criminal History Category I, guideline sentences were costly to taxpayers, had little, if any, incapacitation or deterrent value, and were likely to negatively impact recidivism.¹⁵³

In 1995, a RAND Corporation working group recommended that the "U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug," because "[f]ederal sentences for drug offenders are often too severe: they offend justice, serve poorly as drug control measures, and are very expensive to carry out."¹⁵⁴ In 1999, Commission research staff reported that the Bureau of Prisons had found that drug trafficking offenders were less likely to recidivate than the average federal offender, and that their risk of recidivism could be reduced further with drug treatment.¹⁵⁵ In 2004, the Commission reported its own findings that drug trafficking offenders (along with larceny and fraud offenders) are the least likely to recidivate and that drug treatment and educational opportunities are likely to have a high cost/benefit value.¹⁵⁶

The Commission has been aware since at least the mid-1990s that incarceration prevents little if any drug crime because drug crime is driven by demand, street dealers and couriers are easily replaced, so the crime is simply committed by someone else.¹⁵⁷ While the federal prison population has skyrocketed, drug use rates have increased over the past few years,¹⁵⁸ and teenagers are using dangerous drugs at twice the rate they did in the 1980s.¹⁵⁹ At the same time, the persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, contributes to increased recidivism, and harms families and communities.¹⁶⁰ Studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by

¹⁵² U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994) ("DOJ Drug Offender Analysis"), available on the Booker Fanfan Resources page at <http://www.fd.org>.

¹⁵³ Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994).

¹⁵⁴ Peter Reuter & Jonathan Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. Pub. Health 1059, 1062 (1995).

¹⁵⁵ Hofer & Semisch, *supra* note 50, at *9 n.20, citing Bureau of Prisons, *Recidivism Among Federal Prison Releases in 1987: A Preliminary Report* (March 1994), Bureau of Prisons, *TRIAD Drug Treatment Evaluation Project: Six-Month Interim Report* (July 1998).

¹⁵⁶ *Measuring Recidivism*, *supra* note 32, at 13, 16 & Exh. 11.

¹⁵⁷ U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced), available at <http://www.ussc.gov/crack/CHAP4.HTM>; *Incarceration and Crime*, *supra* note 149, at 6; Hofer & Semisch, *supra* note 50, at *9 n.20; *Measuring Recidivism*, *supra* note 32, at 9; Fifteen Year Report at 133-34.

¹⁵⁸ *Incarceration and Crime*, *supra* note 149, at 6.

¹⁵⁹ Opinion editorial by Eric E. Sterling and Julie Stewart, *Undo This Legacy of Len Bias' Death*, Washington Post, July 24, 2006.

¹⁶⁰ *Incarceration and Crime*, *supra* note 149, at 7-8.

many tons and save billions of taxpayer dollars.¹⁶¹

5. Public Opinion

According to the Rossi and Berk study, the public disagrees with the harshness of drug sentences generally and with the harsher treatment of crack cases:

The strongest sentencing disagreements occur over drug trafficking crimes: The guidelines call for drug trafficking sentences that vary according to the type of drug sold, roles played in the crime and the amount of drugs involved. In contrast, respondents did not make such distinctions nor did they weigh these crime elements the same way as do the guidelines. The result is strong differences in sentencing drug trafficking crimes with the guideline sentences being much harsher. . . . [R]espondents did not treat trafficking in heroin, powder cocaine or crack cocaine very differently from each other. . . . Median sentences for trafficking in crack cocaine, powder cocaine, and heroin all topped out at about 12 years, even for defendants with four prior prison terms. . . . For possession of crack cocaine, powder cocaine, and heroin, average sentences were about a year. For marijuana, the average sentence was essentially probation.¹⁶²

6. Crack Cases

The Commission has declared that it “firmly and 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.”¹⁶³ The rate of below-guideline sentences in crack cases has more than tripled after *Booker*, but, according to the Commission, courts usually do not explicitly cite the crack/powder disparity as the reason.¹⁶⁴ This, plainly, is because open disagreement has been chilled, as the courts of appeals have blindly and disingenuously swallowed DOJ’s baseless contention that Congress decreed that the 100:1 ratio be used not only in applying the mandatory minimum statute but in calculating the guidelines.

While the courts of appeals have accepted DOJ’s argument on the surface, they have mapped out the way to correct for the disparity just the same. In *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006), the First Circuit held that the district court could not “jettison” the guideline range and “construct a new sentencing range,” but encouraged courts to take into account “the nature of the contraband and/or the severity of a projected guideline sentence . . . on a case-by-case basis.” Similarly, in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), the Fourth Circuit prohibited district courts from substituting a different ratio, but it could “certainly envision instances in which some of the § 3553(a) factors will warrant a variance from the advisory sentencing range in a crack cocaine case. However, a sentencing court must

¹⁶¹ *Id.* at 8; Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers’ Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), <http://www.nicic.org/Library/020074>; Sentencing Project, *The Next Big Thing? Methamphetamine in the United States* at 3 (June 2006), available at http://www.sentencingproject.org/pdfs/methamphetamine_report.pdf.

¹⁶² Rossi & Berk, *supra* note 85.

¹⁶³ 2002 Cocaine Report, *supra* note 67, at 91.

¹⁶⁴ *Booker* Report at 111, 128. *But see United States v. Perry*, 389 F.Supp.2d 278 (D.R.I. 2005); *United States v. Clay*, 2005 WL 1076243 at **3-6 (E.D. Tenn. May 6, 2005); *Simon v. United States*, 361 F.Supp.2d 35 (E.D.N.Y. 2005); *United States v. Harris*, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005); *United States v. Smith*, 359 F. Supp.2d 771 (E.D. Wis. Mar. 3, 2005).

identify the *individual* aspects of the *defendant's* case that fit within the factors listed in 18 U.S.C. § 3553(a) and, in reliance on those findings, impose a non-Guidelines sentence that is reasonable.” (emphasis in original). See also *id.* at 637 (analysis and data contained in Commission’s reports may be considered “insofar as they are *refracted through* an individual defendant’s case.” (Michael, J., concurring). See also *United States v. Williams*, ___F.3d___ 2006 WL 2039993 (11th Cir. July 21, 2006) (same); *United States v. Jointer*, ___F.3d___, 2006 WL 2266308 (7th Cir. Aug. 9, 2006) (same).

It is obvious that prohibiting courts from sentencing in disagreement with congressional policy regarding crack or any other matter short of statutory mandatory sentences is just another way of enforcing unconstitutional mandatory guidelines.¹⁶⁵ However, in litigating crack cases, it is wise to avoid any mention of across-the-board policy arguments or alternative ratios. Instead, feel free to draw from issues identified by the Commission in its crack reports, but individualize them to the client and the offense. For example, the sentence overstates the defendant’s culpability and/or need for deterrence and/or need for incapacitation in this case because there was no weapon, no serious violence, or no other offense involved; the offense did not involve a minor; the defendant is merely an addict; the quantity, role or other circumstances show the defendant was not a major dealer; or otherwise, in light of all of the purposes of § 3553(a), a different sentence is required.

C. Immigration Offenses

Average sentence length for immigration offenses nearly tripled from 1990 to 2000, as the Commission increased penalties nearly every year for alien smuggling, §2L1.1, and illegally re-entry, §2L1.2.¹⁶⁶ The best evidence that the immigration guidelines produce sentences that are unduly severe is that they are not followed in the vast majority of cases.¹⁶⁷ Judges and prosecutors have avoided their harshness through “fast track” charge bargaining and departures for many years.¹⁶⁸ Over 80% of immigration cases are prosecuted in districts that have fast track programs in one form or another.¹⁶⁹ Fast track departures represent the highest departure rates by district.¹⁷⁰ Average sentence length in

¹⁶⁵ Sentencing Law and Policy, *Seventh Circuit issues another cracked opinion on the crack ratio*, August 9, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/08/seventh_circuit.html; *Kandirakis*, 2006 WL 2147610 at **6-7.

¹⁶⁶ Fifteen Year Report at 62-65.

¹⁶⁷ See Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 Ariz. St. L.J. 517 (2006); Frank O. Bowman III, *Only Suckers Pay the Sticker Price: The Effect of “Fast Track” Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System* at 4 (September 23, 2003), available at http://www.uscourts.gov/hearings/9_23_03/fbowman.pdf; *Letter to Sentencing Commission from Federal Public and Community Defenders Re: Report on Federal Sentencing Since United States v. Booker 10-11*, January 10, 2006, 18 Fed. Sent. Rep. ___ (forthcoming 2006), available now at http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/defenders_advis.html.

¹⁶⁸ Fifteen Year Report at 87, 91.

¹⁶⁹ According to documents submitted in the *Medrano-Duran* case, *infra*, fast track programs were authorized through at least September 30, 2005 in the Districts of Arizona, Idaho, Nebraska, New Mexico, North Dakota and Oregon, all four California districts, the Southern District of Florida, the Northern District of Georgia, the Eastern District of New York, the Southern and Western Districts of Texas, and the Western District of Washington. Those districts handled 9,150 of the 11,132 immigration cases terminated in 2002. See Federal Justice Statistics Resource Center, available at http://fjsrc.urban.org/noframe/dist/d2002/cat/s2_t2.cfm.

¹⁷⁰ Fifteen Year Report at 112.

immigration cases has dropped by nearly 20% since 2000,¹⁷¹ reflecting an increase in fast track departures,¹⁷² and an increase in fast track charge bargains, the number and precise effect of which is known only to DOJ.

1. The Upward Ratchet in Illegal Re-Entry Cases

Before 1991, defendants sentenced under §2L1.2 received a 4-level increase for a prior felony conviction. In 1991, a 16-level increase was added for re-entering or remaining after a conviction for an aggravated felony, defined initially as murder, drug trafficking, firearms trafficking, money laundering, and crimes of violence for which the term of imprisonment was at least five years.¹⁷³ This was not required by Congress, and was not supported by data or research. It was suggested by a Commissioner, voted on with little discussion, and passed with no explanation.¹⁷⁴ In 1997, the Commission changed the definition to any aggravated felony as defined in 8 U.S.C. §1101(a)(43), which swept in recent statutory amendments adding rape, sexual abuse of a minor, and any crime of violence for which the term of imprisonment was at least one year.¹⁷⁵ This was not required by Congress.¹⁷⁶

In 2001, after a decade of sustained criticism of §2L1.2's "disproportionate penalties,"¹⁷⁷ the Commission retained the 16-level increase for any federal, state or local offense punishable by more than one year that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months, (ii) a crime of violence, (iii) a firearms offense, (iv) a child pornography offense, (v) a national security or terrorism offense, (vi) a human trafficking offense, or (vii) an alien smuggling offense, reduced the increase to 12 levels for a felony drug trafficking offense for which the sentence imposed was 13 months or less, and reduced it to 8 levels for any other aggravated felony.¹⁷⁸ This made matters worse because it broadened crimes of violence from those for which the term of imprisonment was at least one year to those punishable by more than one year.

In 2003, the Commission again extended the reach of the 16-level enhancement and complicated the process by defining certain aggravated felonies (child pornography and human trafficking) more broadly than in 8 U.S.C. § 1101(a)(43).¹⁷⁹ It also redefined "crime of violence" to include statutory rape where previously only "forcible sex offenses (including sexual abuse of a minor)" were included, and "clarified" that the enumerated "crimes of violence" were subject to the 16-level enhancement regardless

¹⁷¹ U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 14 (2000-2005) (showing steady decrease from 28.8 months in 2000 to 23.2 months in 2005), available at <http://www.ussc.gov/annrpts.htm>.

¹⁷² Booker Report at 57-58 n.268.

¹⁷³ U.S.S.G., App. C, amend. 375.

¹⁷⁴ *United States v. Galvez-Barrios*, 355 F.Supp.2d 958 (E.D. Wis. 2005); Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (Mar./Apr.1996); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr.1996).

¹⁷⁵ U.S.S.G. App. C, amend. 562.

¹⁷⁶ See Illegal Immigrant Responsibility Act of 1996, Sec. 321, Pub. L. 104-208, 110 Stat. 3009-627-628.

¹⁷⁷ U.S.S.G. App. C, amend. 632.

¹⁷⁸ U.S.S.G. § 2L1.2 (2001 Guideline Manual).

¹⁷⁹ U.S.S.G. App. C, amend. 658.

of whether the offense had as an element the use, attempted use, or threatened use of physical force against the person of another.¹⁸⁰ No reason was given. In *United States v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006), this resulted in a tragic and irrational sentence of 57 months for a young man who had a consensual sexual relationship with his fourteen-year-old girlfriend when he was 18 years old, with parental approval, and with whom he had a child who he supported financially until he was arrested at the border six years later. The Tenth Circuit said that the sentence was “greater than can be justified,” but defense counsel did not challenge its unreasonableness.

Because of the intense and pervasive criticism of the immigration guidelines, particularly the disproportionate severity of the illegal re-entry guideline, the Commission held a round table and two hearings on the subject in late 2005 and early 2006. By early March 2006, bills had been introduced in the House and the Senate, which, in different ways, would drastically change immigration offenses and penalties. Assured by DOJ that raising penalties would not conflict with DOJ’s recommendations to Congress, the Commission raised sentences in numerous ways for alien smuggling (§2L1.1), trafficking in immigration documents (§2L1.1), and fraud in obtaining immigration documents (§2L2.2), but did not reduce sentences for illegal re-entry.

2. Fast Track: Unwarranted Disparity

In 1998, Commission researchers presented a paper finding that the government’s use of fast track charge bargains and departures created unwarranted disparity in that shorter sentences were unavailable to all similarly situated offenders.¹⁸¹ They updated their findings in 2002, noting that the courts of appeals had ruled that departure to address the “inequity” was impermissible.¹⁸² The Commission made no official statement, took no action, and continued to report fast track dispositions as if they were defense-initiated downward departures.

In 2003, after the Protect Act was passed, the Commission eventually reported that at least 40% of non-substantial assistance departures in 2001 were initiated by the government, and that most of these were fast-track departures.¹⁸³ It concluded: “Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders.”¹⁸⁴ In fact, defendants can receive sentences double or more the average because they are among the 20% unlucky enough to be arrested or “found” in a district without a fast track program.

Despite its duty to avoid unwarranted disparities and its stated methodology of revising the guidelines based on data from actual practice, the Commission has not reduced immigration sentences. After *Booker*, several courts in districts without fast track programs have reduced sentences in immigration cases pursuant to *their* duty to avoid unwarranted disparities under 18 U.S.C. § 3553(a)(6).¹⁸⁵

¹⁸⁰ *Id.*

¹⁸¹ Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

¹⁸² Linda Drazga Maxfield, *Fiscal Year 2000 Update*, 14 Fed. Sent. Rep. 267, 2002 WL 31304862 (Mar./Apr. 2002).

¹⁸³ 2003 Downward Departure Report, *supra* note 29, at iv-v.

¹⁸⁴ *Id.* at 66-67.

¹⁸⁵ *E.g.*, *United States v. Santos*, 406 F.Supp.2d 320 (S.D.N.Y. 2005) (and citing unreported cases); *United States v. Medrano-Duran*, 386 F. Supp.2d 943, 946-48 (N.D. Ill. 2005); *United States v. Peralta-Espinoza*, 383 F. Supp.2d 1107, 1108 (E.D. Wis. 2005); *United States v. Ramirez-Ramirez*, 365 F. Supp.2d 728, 731-32 (E.D. Va. 2005); *United States v. Galvez-Barrios*, 355 F.Supp.2d 958, 963 (E.D. Wis.

DOJ's position is that the absence of a fast track program in the district is an "illegitimate" basis for reducing a sentence. This, according to DOJ, is because Congress approved the disparity created by the Attorney General's designation of some districts for fast track programs and not others, that the disparity is warranted by an explosion of immigration cases in southwest border districts, and that ameliorating that disparity in non-fast track districts somehow damages the government's fast track programs in other districts. All of this is incorrect.

In the Protect Act, Congress directed the Sentencing Commission to promulgate "a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." See Pub. L. 108-21 § 401(m)(2)(B). The Commission did so. See USSG 5K3.1. Congress' intent was to "preserv[e] . . . limited departures pursuant to . . . early disposition programs that allow . . . districts, particularly on the southwest border . . . to process very large numbers of cases with relatively limited resources." See 149 Cong. Rec. 2405, H242 (2003).

According to documents produced by the government in *United States v. Medrano-Duran*, 386 F. Supp.2d 943 (N.D. Ill. 2005), as of October 29, 2004, the Attorney General had approved fast track programs in districts with large immigration caseloads and districts with miniscule immigration caseloads; using a charge bargain method (in which defendants plead to a charge with a 6, 24 or 30-month maximum) and/or the congressionally-approved section 5K3.1 departure; for immigration cases and/or for drug cases.¹⁸⁶

As Judge Kennelly found in *Medrano-Duran*, (1) the charge bargain method used in five of the approved districts was not specifically approved by Congress and results in more of a reduction than the congressionally approved departure method, and (2) in five of the approved districts each AUSA handles between .58 and 3.32 immigration cases per year. As Judge Cassell found in *United States v. Perez-Chavez*, 2005 U.S. Dist. Lexis 9252 (D. Utah 2005), the Attorney General has approved fast track programs in districts far from the border with small immigration caseloads, yet denied them to similarly-situated districts like Utah. At the same time, there are several districts with high immigration caseloads but no fast track programs, including the Southern and Northern Districts of New York, the District of Nevada, the Florida districts, and certain divisions of the Southern District of Texas.¹⁸⁷ Further, there is vast disparity in the extent of sentence reductions among approved fast track programs.¹⁸⁸

In short, the government's arguments that Congress approved the disparity created by the Attorney General's choices and that those choices reflect and are necessary to law enforcement needs are specious. Moreover, the government's position is contrary to its usual position, accepted by a number of courts, that section 3553(a)(6) requires courts to enforce national norms.

Justice Scalia said that "any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional." *Booker*, 543 U.S. at 311 (Scalia, J., dissenting). Nonetheless, the Fourth, Seventh and Ninth Circuits have done just that in prohibiting consideration of fast track disparity. The Seventh Circuit "reasoned" that since a guideline sentence was not necessarily unreasonable if imposed in a district without a fast track program, it followed that a sentence reduced on the basis of the disparity created by the absence of a fast track program was necessarily unreasonable. *United States v. Galicia-Cardenas*, 443 F.3d 553 (7th Cir. 2006). The Ninth Circuit made the fantastic assertion that when

2005).

¹⁸⁶ The documents are available on www.fd.org, *The Truth About Fast Track*. They are also available on PACER.

¹⁸⁷ McClellan & Sands, *supra* note 167.

¹⁸⁸ *Id.*

Congress directed the Commission to promulgate a fast track departure, it “did so with knowledge that 18 U.S.C. § 3553(a)(6) was directing sentencing courts to consider the need to avoid unwarranted sentencing disparities,” and “[b]y authorizing fast track programs without revising the terms of § 3553(a)(6), Congress was necessarily providing that sentencing disparities that result from these programs are warranted and, as such, do not violate § 3553(a)(6).” *United States v. Marcial-Santiago*, 447 F.3d 715 (9th Cir. 2006). The Fourth Circuit’s position is that a variance to correct for the disparity created by the government’s fast track choices cannot be tolerated because it would deprive the government of its unilateral power to choose. This power does not depend on congressional authorization or the need to handle a large immigration caseload, as the court of appeals recognized that Congress did not authorize fast track charge bargains and that fast track dispositions are used in districts with small immigration caseloads, even the Eastern District of North Carolina when the government so chooses. *United States v. Perez-Pena*, 453 F.3d 236 (4th Cir. 2006).

The Sixth Circuit took a more grounded approach in *United States v. Ossa-Gallegos*, 453 F.3d 371 (6th Cir. 2006). The district court had granted a two-level departure to provide for some “equality of justice when sentences vary for people based on where they are sentenced.” The defendant, relying on the 1998 study by Commission researchers, *supra*, argued on appeal that the two-level departure did not eliminate the unwarranted disparity. The Sixth Circuit found that the variance was reasonable although the district court “did not entirely eliminate the disparity between Ossa-Gallegos’s sentence and the sentences of defendants with similar criminal histories in fast-track jurisdictions,” because it did “reduce this disparity,” the defendant did not waive his right to appeal like defendants who receive a four-level departure, and Congress “seems to have endorsed at least some degree of disparity.”

The issue should be raised and preserved, even in circuits that have rejected it, using studies as in *Ossa-Gallegos*, and documentation of fast track programs as in *Medrano-Duran*.

D. Economic Crimes

The fraud/theft guideline, U.S.S.G. § 2B1.1, can easily produce sentences that are greater than necessary to satisfy sentencing purposes, first, because it “place[s] undue weight on the amount of loss involved in the fraud,” which in many cases “is a kind of accident” and thus “a relatively weak indicator of the moral seriousness of the offense or the need for deterrence,”¹⁸⁹ and second, because it imposes cumulative enhancements for many closely related factors.¹⁹⁰ The Commission has not explained why it is appropriate to accord such huge weight to loss or why it promulgated the many overlapping additional adjustments.¹⁹¹ As noted above, Rossi & Berk’s 1995 public opinion survey showed that survey respondents gave substantially smaller additional punishment than the guidelines for increases in dollar amount losses, even before the sharp increases in 2001 and 2003.¹⁹² In *United States v. Adelson*, ___ F.Supp.2d ___, 2006 WL 2008 727 (S.D.N.Y. July 20, 2006), Judge Rakoff provides an incisive analysis of how the fraud guideline can lead to pointlessly barbaric results, and reduces a life sentence to 42 months based on the purposes of sentencing and individualized factors the guidelines reject.

The initial Commission increased sentences for economic crimes above past practice to provide a “short but definite period of confinement for a larger proportion of these ‘white collar’ cases” in the belief

¹⁸⁹ *United States v. Emmenegger*, 329 F.Supp.2d 416, 427-28 (S.D.N.Y. 2004). See also *United States v. Adelson*, ___ F.Supp.2d ___, 2006 WL 2008727 *3 (S.D.N.Y. July 20, 2006).

¹⁹⁰ Constitution Project’s Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 9-10 (July 11, 2006), available at <http://www.constitutionproject.org/pdf/SentencingRecs-Final.pdf>; *United States v. Lauersen*, 362 F.3d 160, 164-65 (2d Cir. 2004); *Adelson*, 2006 WL 2008727 at **4-5.

¹⁹¹ *Adelson*, 2006 WL 2008727 at **3, 5.

¹⁹² Rossi & Berk, *supra* note 85, ch. 4, p. 78.

that this would “ensure proportionate punishment and . . . achieve deterrence.”¹⁹³ A deterrence researcher advised the Commission that certainty is more important to deterrence than severity.¹⁹⁴ Other research has shown that lengthy terms of incarceration have little deterrent effect on white-collar offenders, presumably the most rational group of offenders.¹⁹⁵

Early on, however, the Commission began to ratchet up the punishment for economic crimes in response to pressure from DOJ and perceived signals from Congress.¹⁹⁶ In 1989, former Commissioner Michael K. Block and former Deputy Chief Counsel Jeffrey S. Parker criticized the Commission for “gratuitously” increasing punishment for larger fraud cases by as much as 25% in response to the DOJ *ex officio*’s argument that certain statutes were “oblique signals” from Congress when the statutes “said no such thing.” Block and Parker noted that the process was “overtly political and inexpert,” and that the Commission had abandoned its statutory mandates by failing to rely on its own data, failing to measure the effectiveness or efficiency of guideline sentences, and failing to provide analysis of prison impact.¹⁹⁷

From 1987 to 1995, the Commission increased the punishment for economic crimes nearly annually, resulting in an “unplanned upward drift.”¹⁹⁸ In the Economic Crimes Package of 2001, it lowered sentences for some low-loss offenders but significantly raised sentences for most mid- to high-loss offenders. In 2003, the base offense level was increased from six to seven for defendants convicted of an offense with a statutory maximum of 20 years, *i.e.*, any type of fraud after the Sarbanes-Oxley Act, resulting in a 10% increase for all fraud offenders, and restricting or precluding non-prison alternatives for the 40% of fraud offenders at the lowest level. This followed intense pressure from DOJ and a unilateral amendment of the legislative history by one Senator directing the Commission to determine whether enhanced penalties were warranted not only for the high-end, big-dollar corporate scandals at which Sarbanes-Oxley was directed, but for low-level fraud offenders, after “closely considering” the “penalty gap” between fraud and narcotics cases.¹⁹⁹ However, sentences for low-level drug offenders are overly severe and therefore provided no basis for increasing the punishment for low-level fraud offenders.²⁰⁰

Further, § 2B1.1 includes approximately forty specific offense characteristics, many of which replicate or overlap with the loss concept, with one another, and with further upward adjustments under Chapter 3. In *Adelson*, for example, the government argued for six such enhancements totaling 20 points. Judge Rakoff found four of them, totaling 16 points, but the guideline still required a life sentence. Judge Rakoff found that “here, the calculations under the guidelines have so run amok that they are patently absurd on their face.”²⁰¹ Section 2B1.1 exemplifies what the Commission’s Fifteen Year Report calls “factor creep,” where “more and more adjustments are added” and “it is increasingly difficult to ensure that

¹⁹³ Fifteen Year Report at 56.

¹⁹⁴ Hofer & Allenbaugh, *supra* note 54, at 61 n.192.

¹⁹⁵ See Sally S. Simpson, *Corporate Crime, Law, and Social Control* 6, 9, 35 (Cambridge University Press) (2002); David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995).

¹⁹⁶ Fifteen Year Report at 56.

¹⁹⁷ See Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 *Am. Crim. L. Rev.* 289, 318-20 (1989).

¹⁹⁸ See Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 *Ohio State J. Crim. L.* 373, 387 (2004).

¹⁹⁹ *Id.* at 387-435.

²⁰⁰ See Part II(A), *supra*.

²⁰¹ *Adelson*, 2006 WL 2008727 at *10.

the interactions among them, and their cumulative effect, properly track offense seriousness.”²⁰² Citing to Justice Breyer’s 1999 speech, see Part I(C), *supra*, the Fifteen Year Report notes that “[c]omplex rules with many adjustments may foster a perception of a precise moral calculus, but on closer inspection this precision proves false.”²⁰³ These adjustments have been added on a frequent basis in response to “political pressure,” but “without a sound policy basis” or a demonstrated empirical need.²⁰⁴

E. Firearms Offenses

By 2004, average time served for firearms trafficking and illegal firearms possession had doubled independent of mandatory minimums under § 924(c).²⁰⁵ In a recent article, Mark Rankin and Rachel May explain that much of this due to the use of cross references to uncharged and acquitted more serious offenses, and provide excellent tips on how to avoid such cross references. See Rankin & May, *Traps for the Unwary - Cross References and Guideline Sentencing*, *The Champion* (September/October 2006).

The firearms amendments the Commission voted in on April 5, 2006 are a recent example of the upward ratchet at work, even in some instances when contrary to congressional intent and DOJ’s wishes. The “legislative history” of these amendments can be used to obtain a non-guideline sentence.

“Trafficking” The Commission adopted a “trafficking” enhancement knowing that it applies by its terms to defendants who are not really “traffickers.”

The Commission’s original proposal would have enhanced the sentence whenever more than one firearm was transferred for any reason with or without consideration.²⁰⁶ The Defenders, joined by the Practitioners’ Advisory Group, proposed a narrower alternative based on Congress’ definition of “in the business of” in 18 U.S.C. § 921 and that would preclude double counting with the number of firearms under 2K2.1(b)(1) and the “in connection with” enhancement under 2K2.1(b)(5).²⁰⁷

DOJ proposed a definition as the transfer of, or receipt with intent to transfer, more than one firearm with knowledge or reason to believe the transferee’s possession or receipt would be unlawful, regardless of whether anything of value was exchanged, and would allow double counting.²⁰⁸ DOJ said that firearms “traffickers” traffic in a small number of guns, *i.e.*, two, and often have no criminal history, so penalties must be substantially increased in order to “merit” the expenditure of resources to prosecute them.²⁰⁹

²⁰² Fifteen Year Report at 137, citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 *Psychol. Pub. Pol’y & L.* 739, 742 (2001) (Complexity of Guidelines has created a “façade of precision” which “undermines the goals of sentencing.”).

²⁰³ Fifteen Year Report at 137.

²⁰⁴ *Id.* at 138 (citations omitted).

²⁰⁵ *Id.* at 139.

²⁰⁶ Federal Register Notice at 47-48 (Jan. 27, 2006), <http://www.ussc.gov/FEDREG/Fedreg0106.pdf>.

²⁰⁷ Defenders’ Written Testimony at 11-15 (Mar. 9, 2006), http://www.ussc.gov/hearings/03_15_06/rhodes-testimony.pdf; PAG Written Testimony at 8-9 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/Greg-Smith.PDF.

²⁰⁸ DOJ Written Testimony at 9 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

²⁰⁹ *Id.* at 3-4.

By a vote of 4-2, the Commission adopted an enhancement, closely tracking DOJ's, of 4 levels if the defendant transferred two or more firearms, or received two or more firearms with intent to transfer them, with knowledge or reason to believe that the transferee's possession or receipt would be unlawful by virtue of a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence, or was under a criminal justice sentence (including probation, parole, supervised release, imprisonment, work release, or escape status), or that the transferee intended to use or dispose of the firearm unlawfully, regardless of whether anything of value was exchanged. Double counting with the number of firearms and "in connection with" enhancements explicitly are allowed.²¹⁰

Concerns were raised by one Commissioner (who voted against the amendment), the Defenders, and the Probation Officers' Advisory Group that this definition would apply to persons who are not really traffickers, such as a straw purchaser who buys two or more firearms for a friend, the rural poor who barter guns for necessary items because they have no money, and prohibited possessors who divest themselves of guns as the law requires. The DOJ witness said that the enhancement "**would not be mandatory**" as to straw purchasers and would "**be left on a case-by-case basis for the sentencing judge to determine.**" Another Commissioner (who voted for the amendment) thought that judges would give "**a break**" to defendants who barter guns in rural areas.²¹¹ If you have a client who is not really a "trafficker," make use of this "legislative history." Cf. *United States v. VanLeer*, 270 F. Supp.2d 1318, 1319, 1326-27 (D. Utah 2003) (departing four levels under § 5K2.11 (lesser harms) because defendant's conduct -- briefly possessing a gun so that he could dispose of it to obtain money for rent -- did not threaten the harm that the felon in possession statute seeks to prevent -- violent crimes and consequent personal injury or death). The Commission also seemed to believe that the breadth of its amendment was necessary to prevent urban violence even if it swept in rural offenders.²¹² In this regard, note that Congress directed the Commission in the SRA to consider "the community view of the gravity of the offense" and the "public concern generated by the offense,"²¹³ recognizing that "community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense."²¹⁴ The guidelines make no such provision. Local attitudes and priorities, which differ widely in many respects including as to firearms,²¹⁵ may be considered now that the guidelines are not controlling.

Semiautomatic Weapons The Violent Crime Control and Law Enforcement Act of 1994 (the Act), *inter alia*, created a new offense at 18 U.S.C. § 922(v) criminalizing the manufacture, transfer or possession of a "semiautomatic assault weapon" listed in 18 U.S.C. § 921(a)(30), subject to a five-year maximum under 18 U.S.C. § 924(a)(1)(B), and directed the Commission to enhance punishment for a crime of violence or drug trafficking offense involving a "semiautomatic firearm." In response to the congressional directive, the Commission promulgated the upward departure provision in § 5K2.17 for semiautomatic firearms with a magazine capacity of more than ten cartridges possessed in connection

²¹⁰ Federal Register Notice (May 18, 2006), <http://www.ussc.gov/FEDREG/2006finalnot.pdf>.

²¹¹ Public Hearing at 52-57, 178-79, 182-84, 203-05, 230-31 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf.

²¹² *Id.* at 205-08 (discussing how to write an amendment taking urban and rural concerns into account). The amendment was announced with a statement that it would target urban gun violence.

²¹³ 28 U.S.C. § 994(c)(4), (5).

²¹⁴ U.S. Rep. No 98-225 at 170.

²¹⁵ See Vincent L. Broderick, *Local Factors in Sentencing*, 5 Fed. Sent. Rep. 314, 1993 WL 321688 *2 (1993) ("Possession of a firearm by a felon will be viewed markedly differently in Wyoming, where hunting is a way of life, and in the South Bronx, where a felon with a firearm is a threat to the community."). See also Michael O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 Iowa L. Rev. 721 (2002); Rossi & Berk, *supra* note 79.

with a crime of violence or controlled substance offense.²¹⁶ Congress required nothing further, but the Commission amended § 2K2.1 to require the same enhancements for semiautomatic assault weapons as defined in § 921(a)(30) as those described in 26 U.S.C. § 5845 (sawed-off shotguns, machine guns, bombs, silencers) in calculating the guideline range under § 2K2.1(a)(1), (3), (4) and (5) when the firearm was *not* connected with a crime of violence or drug trafficking offense.²¹⁷

The assault weapons ban was repealed by the terms of the Act on September 13, 2004. Congress has taken no action to re-instate it. Nonetheless, on April 5, 2006, the Commission voted to retain the enhancement in § 2K2.1(a)(1), (3) and (4) (but not (5)), to broaden its definition from the specific list in 18 U.S.C. § 921(a)(30) to a “semiautomatic firearm that is capable of accepting . . . more than 15 rounds of ammunition,” and to amend the definition in §5K2.17 to require more than 15 rounds. The Defenders provided extensive comments demonstrating that this option was not supported by any data, was contrary to congressional intent, and would include ordinary firearms with legitimate uses and little risk of unlawful violence.²¹⁸ DOJ urged the Commission to use the upward departure only and *not* enhanced base offense levels “in light of the fact that possession of such firearms are no longer illegal *per se*.”²¹⁹ The only reason the Commission gave for retaining and expanding the enhancements was that it had “received information” (from Probation Officers) of “inconsistent application . . . in light of the ban’s expiration.”²²⁰

As the Ninth Circuit recently said in holding that possession of a semiautomatic assault weapon was not a “crime of violence:”

The most plausible inference to be drawn from the evolution of federal law as to assault weapons is that Congress allowed the ban to lapse, having found it unnecessary. Because current federal policy places assault weapons on the same footing as other non-registerable weapons, we see this, on balance, as supporting [the defendant’s] position. We find more significant the fact that, when the federal assault-weapon ban ended, Congress didn’t require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns.²²¹

The increased offense levels based on the broadened definition in the 2006 amendment make even less sense.

Obliterated Serial Numbers The Commission increased the enhancement for a firearm with an obliterated serial number from 2 to 4 levels, and declined to include a *mens rea* requirement. When published for comment, the reason given was “the difficulty in tracing firearms with altered or obliterated

²¹⁶ U.S.S.G., App. C., amend. 531.

²¹⁷ U.S.S.G., App. C, amend. 522.

²¹⁸ Defenders Written Testimony at 2-10 (March 9, 2006), http://www.usc.gov/hearings/03_15_06/rhodes-testimony.pdf.

²¹⁹ DOJ Written Testimony at 11 (March 15, 2006), http://www.usc.gov/hearings/03_15_06/Richard-Hertling.PDF.

²²⁰ Federal Register Notice at 45 (May 18, 2006), <http://www.usc.gov/FEDREG/2006finalnot.pdf>.

²²¹ *United States v. Serna*, 435 F.3d 1046, 1049 (9th Cir. 2006).

serial numbers.”²²² The final amendment was published with an additional reason, “the increased market for these types of weapons,”²²³ which was never published for comment or raised by any witness in a public document or hearing. Responding to the reason published, the Defenders provided information from a law enforcement website explaining that the serial number is able to be restored by a simple laboratory procedure in most cases and anecdotal information that the number is recovered more often than not.²²⁴ The Defenders and PAG also urged the Commission to add a *mens rea* requirement based on § 3553(a)(2)(A) (the need to achieve “just punishment” in light of the “seriousness of the offense”) and § 3553(a)(6) (the need to “avoid unwarranted disparities” created by treating dissimilar defendants the same).²²⁵ DOJ expressed no direct opinion on a *mens rea* requirement but perhaps unwittingly supported such a requirement by arguing that the 4-level enhancement would “better reflect the culpability of this conduct” because the “intentional obliteration of a serial number can be intended only to make it more difficult” to trace the firearm.²²⁶ The Commission adopted a 4-level increase and declined to add a *mens rea* requirement. “In Connection With” The Commission defined “in connection with” to mean “the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense [for purposes of the 4-level enhancement] or another offense [for purposes of the cross reference], respectively.” The language is taken from *Smith v. United States*, 508 U.S. 223 (1993), where the Supreme Court interpreted the meaning of “in relation to” in § 924(c)(1). The Commission, however, broadened “in connection with” beyond that contemplated in *Smith* to include finding and taking a firearm during a burglary even if the defendant did not use or possess the firearm in any other way during the burglary, and the mere presence of a firearm in close proximity to drugs or drug manufacturing materials or paraphernalia. The Court made clear in *Smith* that “potential of facilitating” does not include mere coincidence or mere possession or presence of a firearm even during a drug trafficking offense:

The phrase “in relation to” thus, at a minimum, clarifies that the firearms must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. . . . [T]he “in relation to” language allays explicitly the concern that a person could be punished under § 924(c)(1) for committing a drug trafficking offense while in possession of a firearm even though the firearm’s presence is coincidental or entirely unrelated to the crime.

Id. at 238. The Commission’s new definition is even broader than § 2D1.1, comment. (n.3), in that it would apply when a firearm was merely present even when clearly improbable that it was connected with the offense. The Defenders and PAG opposed the amendment, DOJ took no position, but the Commission nonetheless “determined that application of these provisions is warranted in these cases because of the potential that the presence of the firearm has for facilitating another felony offense or another offense.”²²⁷ The *Smith* Court was clearly concerned about proportionality to the seriousness of the offense, both in terms of an increased risk of violence and *mens rea* on the part of the defendant. The Commission’s definition bears no relation to the seriousness of the offense where the firearm was not used, possessed, or intended to be used.

²²² Federal Register Notice at 41 (Jan. 27, 2006), <http://www.ussc.gov/FEDREG/Fedreg0106.pdf>.

²²³ Federal Register Notice at 47 (May 18, 2006), <http://www.ussc.gov/FEDREG/2006finalnot.pdf>.

²²⁴ Defenders’ Written Testimony at 16 (Mar. 9, 2006), http://www.ussc.gov/hearings/03_15_06/rhodes-testimony.pdf; Division of Criminal Investigation, Iowa Department of Public Safety, Restoration of Obliterated Serial Numbers, <http://www.state.ia.us/government/dps/dci/lab/firearms/serialno.htm>.

²²⁵ *Id.* at 17; PAG Written Testimony at 9-10 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/Greg-Smith.PDF.

²²⁶ DOJ Written Testimony at 10 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

²²⁷ Federal Register Notice at 47 (May 18, 2006), <http://www.ussc.gov/FEDREG/2006finalnot.pdf>.

F. Sex Crimes

The key to obtaining a less than guideline sentence in sex cases is a strong record showing that this defendant is not a danger to society. Without such a record, the judge has no incentive or cover to do anything but follow the guidelines. If s/he imposes a lower sentence without strong record support, the government will appeal, the sentence is likely to be overturned, and the case will be a DOJ poster child for restricting judicial discretion.

Contrary to popular myth, sex offenders are amenable to treatment. See CSOM, Office of Justice, Department of Justice, *Myths and Facts About Sex Offenders* (August 2000), <http://www.csom.org/pubs/mythsfacts.html>. They are also less likely to re-offend than non-sex offenders. *Id.*; Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* at 2, <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.

Many (even most) people convicted of possession of child pornography are not child predators. It would be wise, therefore, to have the client evaluated, even if it seems obvious to you that he is not a predator. See *United States v. Bailey*, 369 F.Supp.2d 1090 (D. Neb. May 12, 2005).

If the defendant does have predatory tendencies or the offense involved conduct of a violent or sexual nature with a child, you may be able to develop a strong record that under the circumstances treatment is more beneficial to society than incarceration. See *NACDL Report: Truth in Sentencing? The Gonzales Cases*, 17 Fed. Sent. Rep. 327 (June 2005).

For ideas on how to avoid cross-references in sex cases, see Rankin & May, *Traps for the Unwary - Cross References and Guideline Sentencing*, *The Champion* (September/October 2006).

G. Career Offender

The career offender guideline purports to implement 28 U.S.C. § 994(h), in which Congress directed the Commission to provide punishment at or near the maximum for defendants convicted of three or more specified federal drug offenses and/or crimes of violence. However, as explained below, the Commission defined the offenses far more broadly than Congress required in the statute. Before *Booker*, judges often departed from the career offender guideline to ameliorate its irrational harshness. Nonetheless, in October 2003, the Commission limited the extent of such a departure to one level.²²⁸ In November 2004, the Commission reported that the career offender guideline vastly overstates the risk of recidivism and any contribution to deterrence, at least in drug cases. Not surprisingly, in career offender cases after *Booker*, courts have substantially reduced career offender sentences based on the Commission's failure to distinguish between serious and non-serious offenses,²²⁹ the rate of within guideline sentences has "noticeably declined," and average sentence length has decreased.²³⁰ In 28 U.S.C. § 994(h), Congress directed the Commission to provide punishment at or near the maximum for a defendant convicted of a "felony" that is "described in" 21 U.S.C. §§ 841, 952(a), 955, 959, or 46 U.S.C. App. 1901 *et seq.* (prohibiting manufacture, distribution, dispensation; possession with intent to manufacture, distribute or dispense; and importation of a controlled substance) or is a "crime of violence,"

²²⁸ U.S.S.G., App. C, amend. 651 (2004).

²²⁹ *E.g.*, *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006); *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2006); *United States v. MacKinnon*, 401 F.3d 8 (1st Cir. 2005); *United States v. Fernandez*, ___ F.Supp.2d ___, 2006 WL 1770268 (E.D.Wis.2006); *United States v. Person*, 377 F. Supp.2d 308 (D. Mass. 2005); *United States v. Hubbard*, 369 F. Supp.2d 146, 148 (D. Mass. 2005); *United States v. Naylor*, 359 F. Supp.2d 521 (W.D. Va. 2005); *United States v. Serrano*, No. 04-CR-414, 2005 U.S. Dist LEXIS 9782, at *22-25 (S.D.N.Y. May 19, 2005); *United States v. Carvajal*, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005).

²³⁰ *Booker Report* at 137-140.

after previously being convicted of two or more such felonies. Congress had in mind “repeat violent offenders and repeat drug traffickers.”²³¹ Instead of using felonies under the specified federal drug statutes, the Commission used the term “controlled substance offense.” Initially, this was defined as “an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 959, and similar offenses,” but was soon broadened to “an offense under federal or state law, punishable by imprisonment exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute or dispense.” U.S.S.G. § 4B1.2(b). The inclusion of state offenses seems defensible though not mandated, but the Commission exceeded the statutory directive by including crimes not specified in 28 U.S.C. § 994(h), including export, conspiracy, attempt, possession of a flask or equipment with intent to manufacture under 21 U.S.C. § 843(a)(6), maintaining a place for the purpose of facilitating a controlled substance offense under 21 U.S.C. § 856, and use of a communications facility in committing or facilitating a controlled substance offense under 21 U.S.C. § 843(b). *Id.* & comment. (n.1). Further, the guideline includes any offense that is punishable by as little as a year and a day, while the lowest statutory maximum for the vast majority of the offenses specified by Congress is twenty years. See 21 U.S.C. §§ 841(b), 960(b). Only two of the specified offenses are subject to a lower statutory maximum of five years: wrongful distribution or possession of a List I or II chemical, 21 U.S.C. § 841(f), and importation of lesser amounts of marijuana or hashish, 21 U.S.C. §960(b)(4). At least in drug cases, career offender status is not justified by an increased risk of recidivism or effective deterrence. The recidivism rate for offenders whose career offenders status is based on drug offenses “resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules.” Thus, the career offender guideline “makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses.”

Further, criminologists and law enforcement officials have advised the Commission that retail-level drug traffickers are readily replaced as long as demand remains high. Thus, lengthy incapacitation of low-level drug sellers “prevents little, if any, drug selling; the crime is simply committed by someone else.” Finally, because career offenders by virtue of drug priors are disproportionately African American, the career offender guideline has a disparate racial impact that is not justified (regardless of race) by sentencing purposes.²³² The Commission’s definition of “crime of violence” also is problematic in that it commonly reaches offenders who are not the “repeat violent offenders” Congress had in mind. The original career offender guideline defined “crime of violence” as Congress did when it enacted 28 U.S.C. § 994(h), that is, as in 18 U.S.C. § 16, section (b) of which defines a “crime of violence” as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical *force* against the person or property of another may be used in the course of committing the offense.” In 1989, the definition was amended to track 18 U.S.C. § 924(e), so that the catchall clause now covers any offense punishable by more than one year that “involves conduct that presents a serious potential risk of physical *injury* to another.” The courts have interpreted this provision to include offenses that involve no actual violence or actual injury to another. Among the offenses that courts have found to be “violent” under this definition are tampering with a motor vehicle,²³³ burglary of a non-dwelling,²³⁴ fleeing and eluding,²³⁵

²³¹ S.Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1983).

²³² Fifteen Year Report at 133-34 (emphasis in original).

²³³ *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006).

²³⁴ *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992).

²³⁵ *United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005); *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006).

operating a motor vehicle without the owner's consent,²³⁶ possession of a short-barreled shotgun,²³⁷ oral threatening,²³⁸ car theft,²³⁹ and failing to return to a halfway house.²⁴⁰ Other offenses that have been found to be crimes of violence under the identical language in 18 U.S.C. § 924(e) include pickpocketing,²⁴¹ possession of a sap,²⁴² failing to stop for a blue light,²⁴³ carrying a concealed weapon,²⁴⁴ and driving while intoxicated.²⁴⁵ As a result, many defendants who have never physically harmed another human being have been classified as violent career offenders. Rather than accurately identifying and punishing violent, predatory offenders, too often the career offender guideline snatches up defendants convicted of nothing more than low-risk crimes of opportunity and property offenses that seem in no way intrinsically violent. The problem is exacerbated by defining a prior felony conviction as a "prior adult federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2, comment. (n.1). Some states have misdemeanors punishable by up to two years (North Carolina, Pennsylvania), two and a half years (Massachusetts), three years (South Carolina), and even ten years (Maryland). Thus, defendants are regularly classified as career offenders based on misdemeanor convictions that resulted in only the most minimal punishment in state court.²⁴⁶ This results in punishment that is disproportionate to the seriousness of the offense and unwarranted uniformity. A defendant who receives two simple assault convictions for bar room scuffles and spends not a day in jail is treated no differently under the career offender guideline than a defendant with murder and rape convictions. The Commission need not have chosen a definition so wildly over-inclusive. It could have used the definition of felony used in 18 U.S.C. § 924(e), which excludes convictions designated as misdemeanors by the jurisdiction. See 18 U.S.C. § 921(a)(20)(B). Finally, according to the Rossi & Berk public opinion survey, "there was little support for sentences consistent with most habitual offender

²³⁶ *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005).

²³⁷ *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005).

²³⁸ *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

²³⁹ *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir.2002).

²⁴⁰ *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir.2002).

²⁴¹ *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994).

²⁴² *United States v. Canon*, 993 F.2d 1439 (9th Cir. 1993).

²⁴³ *United States v. James*, 337 F.3d 387 (4th Cir. 2003).

²⁴⁴ *United States v. Hall*, 77 F.3d 398 (11th Cir. 1996).

²⁴⁵ *United States v. Begay*, 377 F. Supp. 2d 1141 (D. N.M. 2005).

²⁴⁶ *E.g.*, *United States v. Thompson*, 88 Fed.Appx. 480 (3d. Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 191 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer punished by unsupervised probation and \$25 fine qualified as career offender predicate); see also *NACDL Report: Truth in Sentencing? The Gonzales Cases*, 17 Fed. Sent. Rep. 327, **7-11 (June 2005) (defendant's guideline sentence was increased nine-fold as a result of being classified as a career offender based on two state misdemeanors and one minor felony: (1) assault and battery, a misdemeanor under state law punishable by 0-10 years; (2) "failure to stop for a blue light," a misdemeanor under state law punishable by 90 days to three years; and (3) possession of less than one gram of cocaine base, a felony under state law punishable by 0-5 years, all classified as non-violent under South Carolina law, and all of which the defendant pled guilty to on the same day at the age of 18, for which he received a suspended sentence and served seven months after revocation of probation).

legislation. To be sure, longer previous criminal records led to longer sentences, but at substantially smaller increments than under such initiatives as ‘three-strikes-and-you’re out.’”²⁴⁷

H. First Offenders

The Commission has found that minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism, which the Guidelines do not take into account.²⁴⁸ Nonetheless, the Commission prohibits a departure below the applicable range for Criminal History Category I. See U.S.S.G. § 4A1.3(b)(2). Further, Congress directed the Commission twenty-two years ago to ensure that the “guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.”²⁴⁹ The Commission recognizes the need to act on this directive, but has not yet done so.²⁵⁰

In 1991, a Commission working group proposed several alternatives to implement the congressional directive, including (1) a two-level reduction for offenders who had zero criminal history points and did not use violence or weapons in the instant offense; or (2) allowing first offenders access to probation or other alternatives to prison.²⁵¹ In 2000, another working group also studied alternatives and in 2001, former Commissioner Michael O’Neill proposed a new first offender Criminal History Category or a downward departure for first offenders.²⁵²

In 2004, the Commission reported that over 49% of federal offenders in 1992 had zero criminal history points; in 2001, that percentage was over 40%.²⁵³ First offenders are more likely to be involved in less dangerous offenses and their offenses involve fewer indicia of culpability, such as no use of violence or weapons, no bodily injury, a minor role or acceptance of responsibility.²⁵⁴ They are also more likely than offenders with criminal histories to have a high school education, to be employed or to have dependents.²⁵⁵ Further supporting alternatives to prison for this group is the finding that offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.²⁵⁶

However “first offender” status is defined, the rate of recidivism (including reconviction, rearrest or revocation) for first offenders is 11.7%, which is significantly lower than the rate of 22.6% for offenders

²⁴⁷ Rossi & Berk, *supra* note 85, Executive Summary.

²⁴⁸ *Salient Factor Score*, *supra* note 32, at 15.

²⁴⁹ 28 U.S.C. § 994(j).

²⁵⁰ *First Offender*, *supra* note 32, at 1-2.

²⁵¹ *Id.* at 3.

²⁵² *Id.* at 3 (citing Michael E. O’Neill, *Abraham’s Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 *Bost. Coll. L. Rev.* 291 (2001)).

²⁵³ *Id.* at 4.

²⁵⁴ *Id.* at 9-10.

²⁵⁵ *Id.* at 6-11.

²⁵⁶ *Measuring Recidivism*, *supra* note 32, at 13 & Exhibit 12.

with one criminal history point, or that of 36.5% for offenders with two or more criminal history points.²⁵⁷ The rate of reconviction alone is similarly much lower: offenders with zero criminal history points have a reconviction rate of 3.5%, those with one point have a reconviction rate of 5.5%, those with two or more points have a reconviction rate of 10.3%.

After *Booker*, the rate of non-government-sponsored below-range sentences increased for first offenders, defined as those with no contact with the criminal justice system whatsoever, including no arrests or other non-countable events.²⁵⁸

I. Criminal History

The guidelines' criminal history rules were not based on empirical evidence, because of "pressing congressional deadlines."²⁵⁹ The Commission said it would incorporate empirical research and data as it became available, but still has not done so.²⁶⁰ After *Booker*, as before, criminal history has been one of the most frequent bases for sentences below the guideline range.²⁶¹ The Commission has long recognized that the criminal history rules treat unlike offenders alike, for example, by adding three points to criminal history score whether the sentence imposed was 14 months or 14 years, and failing to distinguish between sentences of the same length imposed in parole and non-parole systems though the defendants serve two very different terms of imprisonment.²⁶²

Studies published by the Commission in 2004 and 2005 demonstrate that the guidelines exclude considerations that predict a reduced risk of recidivism or an increased likelihood of rehabilitation, and include factors that increase the criminal history score but have no predictive value or overstate the risk of recidivism.

- Age: Age is a powerful component of recidivism prediction, which the Guidelines do not take into account.²⁶³ "Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21, to 9.5% over age 50.²⁶⁴
- Employment: Stable employment in the year prior to arrest is associated with a lower risk of recidivism.²⁶⁵
- Education: Recidivism rates decrease with increasing educational level (no high school, high school, some college, college degree).²⁶⁶
- Family: Recidivism rates are lower for defendants who are or were ever married, even if

²⁵⁷ *First Offender*, *supra* note 32, at 13-14.

²⁵⁸ *Booker Report* at 132 & n.348.

²⁵⁹ *Measuring Recidivism*, *supra* note 32, at 1-2; *Salient Factor Score*, *supra* note 32, at 2-4.

²⁶⁰ *Measuring Recidivism*, *supra* note 32, at 2.

²⁶¹ *Booker Report* at 79.

²⁶² Simplification Draft Paper, Chapter Four, Part V, <http://www.ussc.gov/SIMPLE/crimhist.htm>.

²⁶³ *Salient Factor Score*, *supra* note 32, at 8, 13-15.

²⁶⁴ *Measuring Recidivism*, *supra* note 32, at 12 & Exhibit 9.

²⁶⁵ *Id.* at 12 & Exhibit 10.

²⁶⁶ *Id.*

- divorced.²⁶⁷
- Gender: Women recidivate at a lower rate than men.²⁶⁸
- Abstinence from drug use: Recidivism rates are lower for those without illicit drug use in the year prior to the offense.²⁶⁹
- Rehabilitation and Education: Drug treatment programs and educational opportunities would have a high cost-benefit value.²⁷⁰
- Non-Violent Offenders: Offenders sentenced under the fraud, larceny and drug guidelines are the least likely to recidivate.²⁷¹
- Uncounted crimes of violence: The predictive power of U.S.S.G. § 4A1.1(f) is statistically insignificant.²⁷²
- Minor offenses: Inclusion of non-moving traffic violations in the criminal history score may adversely affect minorities “without clearly advancing a purpose of sentencing” (regardless of the defendant’s race) and “there are many other” such possibilities.²⁷³

Many courts and commentators have recognized, and many studies have shown, that African Americans are stopped by the police and charged only with traffic offenses in disproportionate numbers, often called “driving while black.”²⁷⁴

- Increased Recidivism with Straight Prison Offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.²⁷⁵

J. Unnecessary Use of Imprisonment

After *Booker*, courts need not impose imprisonment as recommended by U.S.S.G. § 5C1.1 but may use a non-prison alternative that better satisfies the purposes of punishment, including the need for treatment, medical care or rehabilitation in the most effective manner.²⁷⁶ “Without such options, the

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 11 & Exhibit 9.

²⁶⁹ *Id.* at 13 & Exhibit 10.

²⁷⁰ *Id.* at 15-16.

²⁷¹ *Measuring Recidivism*, *supra* note 32, at 13 & Exhibit 11.

²⁷² *Salient Factor Score*, *supra* note 32, at 7, 11, 15.

²⁷³ Fifteen Year Report at 134.

²⁷⁴ *E.g.*, *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 954 (9th Cir. 2003); *Washington v. Lambert*, 98 F.3d 1181, 1182 n. 1 (9th Cir. 1996); *Smith v. City of Gretna Police Dept.*, 175 F. Supp.2d 870, 874 (E.D. La. 2001); *Martinez v. Village of Mount Prospect*, 92 F. Supp.2d 780, 782 (N.D. Ill. 2000); *United States v. Leviner*, 31 F. Supp.2d 23, 33 (D. Mass. 1998); *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Minn. L. Rev. 425 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-52 (1998); Jennifer A. Larrabee, *“DWB (Driving While Black)” and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & Pl’y 291, 296 (1997).

²⁷⁵ *Measuring Recidivism*, *supra* note 32, at 13 & Exhibit 12.

²⁷⁶ *United States v. Anderson*, 365 F.Supp.2d 67 (D. Me. 2005); *United States v. Greer*, 375 F.Supp.2d 790 (E.D. Wis. 2005); *United States v. Cherry*, 366 F.Supp.2d 372 (E.D. Va. 2005); *United States v. Myers*, 353 F.Supp.2d 1026 (S.D. Iowa 2005); *United States v. Ranum*, 353 F.Supp.2d 984 (E.D. Wis. 2005).

current sentence regime fails to accomplish its retributive, deterrent, and rehabilitative goals.” See Nora Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339 (2005).

The need to allow for more options and flexibility at lower offense and criminal history levels was manifest in the first years of the guidelines. In 1989 a Commission project was authorized to address the need for more options and flexibility at lower offense and criminal history levels. The result was a 1990 report from the Commission’s Alternatives to Imprisonment Project, *The Federal Offender: A Program of Intermediate Punishments*, also known as the “Corrothers White Paper.” The report gathered data from the federal system, various state programs, and surveyed the judiciary. Cost savings, fairness, effectiveness and efficient utilization of prison space were all important considerations.

The report recommended a number of sentencing alternatives, most of which were already available in the context of supervised release. It recommended expanding the availability of such sentences to a greater number of offense levels (in effect, increasing Zone B and Zone C sentences by five offense levels through Criminal History Category III). The programs recommended as intermediate punishments included:

- Intermittent Confinement
- Community Confinement
- Residential Incarceration
- Home Detention
- Intensive Supervision
- Public Service Work
- Shock Incarceration (boot camps).

The only amendments the Commission has made in this area were to include a policy statement supporting shock incarceration programs (§ 5G1.2) in 1991, which BOP eliminated in 2005. In 1992, Zone A was expanded by two additional offense levels in Criminal History Category I. Otherwise, the Commission has not implemented the recommendations of the Corrothers White Paper.

In 1994, the General Accounting Office recommended intermediate sanctions for punishing low-risk offenders at a lower cost to the taxpayers.²⁷⁷ Almost half of all district court judges surveyed in 2002 urged greater availability of non-prison sentences for drug-trafficking offenders, and a slightly smaller number for theft, larceny, embezzlement, and fraud offenders, in order to meet the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).²⁷⁸

K. Tips for Reconstructing the “Legislative History” of a Guideline

As in the preceding examples, a little digging will often provide arguments for why the guideline at issue in your case should not be followed (because it was adopted or increased without considering the purposes of sentencing, without study or explanation, contrary to the information before the Commission, and/or contrary to or without a statutory directive), and affirmative reasons for a sentence below the guideline range. These arguments are also necessary in any petition for certiorari challenging presumptive guidelines in their new guise.

- A good place to start is Hutchison et al., *Federal Sentencing Law and Practice* (West), which is updated annually and is available on Westlaw in the fslp database.

²⁷⁷ United States General Accounting Office, *Sentencing: Intermediate Sanctions in the Federal Justice System* (1994).

²⁷⁸ U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines ES-5-6* (2003), <http://www.ussc.gov/judsurv/execsum.pdf>; Fifteen Year Report at 44-45.

- Historical Note at the end of each guideline listing amendments.
- Appendix C of the Manual setting out the amendments and reasons, if any.
- Federal Register Notices published before and after amendment, available at <http://www.ussc.gov/NOTICE.HTM>.
- Written and oral testimony and comments of the Federal Public and Community Defenders, the Practitioners Advisory Group, the National Association of Criminal Defense Lawyers, the Probation Officers Advisory Group, and DOJ, available at <http://www.ussc.gov/HEARINGS.HTM>, <http://www.fd.org> (go to Publications & Materials, then to Sentencing), <http://www.usscpag.com/index.asp>, <http://www.nacdl.org/public.nsf/freeform/Rules&Reg?OpenDocument>, <http://www.ussc.gov/POAG/minutes.html>
- Any congressional directive cited in the Commission’s reason for amendment (Always check the legislation itself. You may find that Congress only told the Commission to study whether penalties should be increased, or amended a criminal statute with no directive to the Commission, or told the Commission to increase penalties in a limited way that the Commission exceeded. See, e.g., *United States v. Butler*, 207 F.3d 839 (6th Cir. 2000) (U.S.S.G. § 3B1.4 authorizing enhancement for using or attempting to use a minor in the offense regardless of defendant’s age was contrary to statute directing that the defendant be at least twenty-one).)
- Commission Publications, available at <http://www.ussc.gov>.
- The “public comment file,”²⁷⁹ available at the Commission for on-site inspection, or may be located and copied upon request if not too voluminous or complex.

III. Post-Booker Sentencing Violates Basic Principles of Statutory Construction.

Congressional intent as expressed in § 3553(b) is no longer an option. After *Booker*, many courts continue to follow congressional intent as expressed in § 3553(b). They do this in one of three ways: explicitly,²⁸⁰ by assuming that the guidelines achieve what Congress had in mind when it sought to avoid unwarranted disparity,²⁸¹ or by asserting that the guidelines incorporate § 3553(a).²⁸² The whole exercise of the *Booker* remedial opinion was to determine congressional intent had Congress known that judicial factfinding was unconstitutional under § 3553(b). Determining that Congress would have preferred judicial factfinding under § 3553(a) over jury factfinding under § 3553(b), the Court excised § 3553(b). As the Court explained, “that mandatory system is no longer an open choice.”²⁸³ Thus, the courts may not look to congressional intent under § 3553(b). The short trip back to § 3553(b) began with the assertion that the *Booker* Court did not say how much weight to give the guidelines, so the lower courts must make that determination.²⁸⁴ What weight to accord the guidelines, however, was never an open question. By excising § 3553(b), the Court made § 3553(a) the governing law in the district court, which “makes the guidelines effectively advisory.”²⁸⁵ Put another way, the “advisory” weight of the guidelines is a function of a statutory structure that “sets forth numerous factors that govern sentencing,” of which the guidelines are

²⁷⁹ U.S. Sentencing Commission, Rules of Practice and Procedure, Rule 5.1, available at http://www.ussc.gov/general/rules11_01.pdf.

²⁸⁰ See note 5, *supra*.

²⁸¹ See, e.g., *United States v. Mykitiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

²⁸² See, e.g., *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006).

²⁸³ *Booker*, 543 U.S. at 263.

²⁸⁴ E.g., 2/10/05 Commission Testimony, *supra* note 9; *Wilson*, 350 F.Supp.2d at 912.

²⁸⁵ *Booker*, 543 U.S. at 245.

but one.²⁸⁶ As the Sentencing Commission has explained:

Sentencing guidelines systems . . . range along a continuum from “voluntary” or “advisory,” to “presumptive,” to “mandatory.” The differences among them are marked by the standards governing when a judge may depart from the recommended guideline range, and the extent of appellate review of those departures. The original federal legislation called for advisory guidelines with limited appellate review. During Senate debates in 1978 however a standard was added requiring that judges sentence within the prescribed guideline range unless “the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Commission in formulating the guidelines and that should result in a different sentence.” This was intended to ensure that the guidelines were treated as “presumptive” rather than “voluntary.”²⁸⁷

The original version of the Sentencing Reform Act (SRA) would have made the guidelines “advisory” in language much like § 3553(a). Section 3553(b) was added to make the guidelines “presumptive” rather than “advisory.”²⁸⁸ Presumptive guidelines are no longer an option under the plain language of § 3553(a) or the Sixth Amendment.

Instead, courts must follow the plain language of 3553(a), and may not render any part of it inoperative, superfluous or insignificant. The courts must follow the plain language of the statute the Supreme Court left standing: § 3553(a).²⁸⁹ When the language of a statute is plain, courts may not look to statutory policies or legislative history to construe the statute in a manner that is not clearly warranted by the text.²⁹⁰ By the statute’s plain terms, judges must “impose” a sentence that is sufficient but not greater than necessary to satisfy the statutory purposes of sentencing, after “considering” a list of factors pertinent to the case, of which the guidelines are one.²⁹¹ Not only does the statute say nothing about giving special weight to the guidelines, it makes the guidelines subordinate to the overarching mandate to impose a sentence minimally sufficient to satisfy the purposes of sentencing.²⁹² This “parsimony principle” dates

²⁸⁶ *Id.* at 261.

²⁸⁷ Fifteen Year Report at 7.

²⁸⁸ See *Booker*, 543 US at 293 & n.12 (Stevens, J., dissenting in part); Stith & Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 238, 245-46 (1993); 124 Cong. Rec. 209, 382-83 (1978); S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193 (1983).

²⁸⁹ See *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Zedner v. United States*, 126 S. Ct. 1976, 1990-91 (2006) (Scalia, J. concurring).

²⁹⁰ *Crandon v. United States*, 494 U.S. 152, 160 (1997).

²⁹¹ *Booker*, 543 U.S. at 259-60.

²⁹² *United States v. Foreman*, 436 F.3d 638, 643-44 & n.1 (6th Cir. 2006) (district court must follow the “statutory mandate to ‘impose a sentence sufficient, but not greater than necessary’ to comply with the purposes of sentencing in section 3553(a)(2)”; *United States v. Cawthorn*, 419 F.3d 793, 802 (8th Cir. 2005) (“district court’s duty” is to “impose a sentence sufficient but not greater than necessary”); *United States v. Neufeld*, 2005 WL 3055204 *9 (11th Cir. Nov. 16, 2005) (a “more-than-adequate sentence would conflict with § 3553(a)’s injunction against greater-than-necessary sentences”); *United States v. Soto*, 2005 WL 281178 (3^d Cir. Oct. 27, 2005) (the sentence must be “adequate and appropriate, not greater than necessary”); *United States v. Acosta-Luna*, 2005 WL 1415565 (10th Cir. June 17, 2005) (the “provisions of 18 U.S.C. § 3553(a), unconstrained by mandatory application of the Guidelines, are now preeminent in sentencing”).

back to the 1800s, influenced the Founding Fathers in their views about punishment,²⁹³ is implicit or explicit in the guideline systems of most states²⁹⁴ and the Model Penal Code,²⁹⁵ and is clearly stated in section 3553(a), which now governs sentencing. Its rationale is that severe penalties are costly to the public, usually harmful to offenders, and have uncertain and limited deterrent value, so the preference is for the least punishment necessary for the public welfare.²⁹⁶ The guideline range is subordinate to it: The sentence that is minimally sufficient to achieve sentencing purposes must be “imposed,” while the guideline range must be “considered.”

Under basic canons of statutory construction, every part of a statute has meaning and no provision should be construed as inoperative, superfluous, or insignificant.²⁹⁷ When courts presume that the guidelines incorporate the requirements of § 3553(a), they render the rest of the statute inoperative and superfluous. (They also fail to appreciate how frequently the guidelines fail to reflect § 3553(a). See Parts I and II, *supra*.) Likewise, when courts equate the guidelines with the avoidance of unwarranted disparity under § 3553(a)(6), they render the rest of the statute inoperative. (They also misconstrue congressional intent, and Justice Breyer’s intent, with respect to uniformity. See Part I(D), *supra*.)

Appeals courts must apply the same standard of review to all sentences. After *Booker*, the pre-2003 text of section 3742(e)(3), which “told appellate courts to determine whether the sentence ‘is unreasonable’ with regard to § 3553(a),” applies “across the board” and “irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a).”²⁹⁸ Use of a rebuttable presumption of reasonableness for sentences within the guideline range violates this aspect of the Court’s interpretation of the sentencing law. Some circuits rubber-stamp sentences within or above the guideline range,²⁹⁹ while reversing below-guideline sentences with what amounts to *de novo* review.³⁰⁰ These circuits violate the Court’s express rejection of “such ‘one-way lever[s]’” as “[in]compatible with Congress’ intent . . . of promoting uniformity in sentencing.”³⁰¹ As the Second Circuit has put it: “Obviously, the discretion that *Booker* accords sentencing judges to impose non-Guidelines sentences cannot be an escalator that only goes up.”³⁰² As Judge Heaney of the Eighth Circuit has said: “Affirming upward variances at a rate of 92.3% while affirming downward variances at a rate of 15.8% could hardly be viewed as uniform treatment, and seems contrary to 18 U.S.C. §

²⁹³ Garry Wills, *Inventing America* 94 (1979); David McCullough, *John Adams* 66-67 (2001); Jeremy Bentham, *The Rationale of Punishment* 23 (1830) (“All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”).

²⁹⁴ Richard S. Frase, *Punishment Purposes*, 58 *Stan. L. Rev.* 67, 68 (2005).

²⁹⁵ Model Penal Code: Sentencing § 1.02(2)(a)(iii) (Preliminary Draft No. 3 2004).

²⁹⁶ Frase, *supra* note 294, at 68; Norval Morris, *The Future of Imprisonment* 59-62 (1974).

²⁹⁷ *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Jones v. United States*, 529 U.S. 848, 857 (2000); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Collausti v. Franklin*, 439 U.S. 379, 392 (1979).

²⁹⁸ *Booker*, 543 U.S. at 260, 261, 263.

²⁹⁹ *E.g.*, *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *United States v. Saldana*, 427 F.3d 298 (5th Cir. 2005); *United States v. Smith*, 440 F.3d 704 (5th Cir. 2006); *United States v. Reinhart*, 442 F.3d 857 (5th Cir. 2006).

³⁰⁰ *E.g.*, *United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006).

³⁰¹ *Booker*, 543 U.S. at 266 (internal citations omitted).

³⁰² *United States v. Johnson*, ___ F.3d ___, 2006 WL 2167171 *4 (2d Cir. Aug. 2, 2006).

3553(a)(6)'s concern with eliminating unwarranted sentence disparity. . . . It is difficult to accept that § 3553(a)(6) is satisfied where a circuit treats sentencing appeals in a consistently disparate manner."³⁰³ This unwarranted disparity should be demonstrated with statistics in petitions for certiorari. Professor Berman's blog periodically reports these statistics, but he acknowledges that they are not complete. A review of circuit caselaw is therefore preferable.

Practice Tip. All of the appellate courts have said that the guideline range must be calculated first. This is not objectionable as long as it does not amount to a presumption that the defendant must overcome. As the Sixth Circuit said, once the guideline range is calculated, "the district court throws this ingredient into the section 3553(a) mix," considering, as *Booker* requires, the minimally sufficient mandate and other factors relevant to the case.³⁰⁴

As a matter of advocacy in sentencing memoranda and argument, do not calculate the guideline range first. Start with the sentence requested, then justify it with the statutory purposes and factors. It will often make sense to discuss the factors in order of appearance in the statute. Begin with those most favorable, which usually will be the mitigating history and characteristics of the defendant, then a balanced presentation of the offense, including mitigating circumstances. End with an explanation of why the sentence you have requested is sufficient but not greater than necessary to satisfy the purposes of sentencing in light of the relevant factors in the case, including the guidelines.

IV. Post-Booker Sentencing Violates the Constitution.

A. Sixth Amendment Right to Jury Trial

In *Blakely* and *Booker*, the Supreme Court explained that the right to jury trial is no procedural formality, but a fundamental reservation of power in the people in our constitutional structure, intended by the Framers to stand between the individual and the power of government.³⁰⁵ In order to preserve Sixth Amendment substance, the Court held that the right to jury trial attaches to all facts essential to punishment, which include facts under mandatory sentencing guidelines.

As explained in Part III, though the Supreme Court called the pre-*Booker* guidelines "mandatory," they were not entirely mandatory but "presumptive," because § 3553(b) required a sentence within the guideline range absent a circumstance of a kind or degree not taken into consideration by the Commission in formulating guidelines. This made the guidelines "presumptive" rather than "advisory" as they had originally been conceived. The system in *Blakely*, too, was "presumptive," as it permitted the court to impose a sentence outside the standard range for the offense of conviction based on "substantial and compelling reasons."³⁰⁶

The *Booker* merits majority held that judicial factfinding under such a system violated the Sixth Amendment. Justice Stevens wrote:

The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. . . . At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. . . . Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally

³⁰³ *United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8th Cir. 2006).

³⁰⁴ *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006).

³⁰⁵ *Booker*, 543 U.S. at 237; *Blakely*, 542 U.S. at 305-07.

³⁰⁶ *Blakely*, 542 U.S. at 299.

permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely*, holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for “substantial and compelling reasons,” that exception was not available for *Blakely* himself.³⁰⁷

Some courts of appeals attempt to distinguish the post-*Booker* presumption of reasonableness from the system held unconstitutional in *Booker* by insisting that it does not mean a sentence outside the guideline range is presumptively unreasonable.³⁰⁸ The ratio of appellate reversals of outside-guideline sentences (hundreds) to reversals of within-guideline sentences (one) belies this contention. In fact, 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 factors . . . making the Guidelines, in effect, mandatory.”³⁰⁹ Further, the circuits justify the presumption of reasonableness with the assertion that the Sentencing Commission took into account all of the § 3553(a) purposes and factors in formulating the guidelines. This makes the guidelines even more mandatory than they were before *Booker*.

When a court of appeals says the guidelines are presumptive, but provides no meaningful review of above-guideline sentences, does this mean that judges in that circuit really are bound only by the statutory maximum despite the presumption? The answer is no and it is found in *Blakely*. These circuits start with a presumption in favor of the guidelines and require *some* finding of fact for a sentence outside the guidelines other than the elements of the offense of conviction.³¹⁰ In *Blakely*, the Court said:

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.³¹¹

B. Procedural Accuracy and Fairness

Though the Sentencing Commission is “not a court, and does not exercise judicial power,” *Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989), it promulgated a “policy statement” regarding minimally sufficient constitutional protections. U.S.S.G. § 6A1.3 states that the Commission “believes” that a preponderance of the evidence standard satisfies the Due Process Clause, and tells

³⁰⁷ *Booker*, 543 U.S. at 234, citing *Blakely*, 542 U.S. at 299.

³⁰⁸ *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006).

³⁰⁹ *United States v. Myers*, 353 F.Supp.2d 1026 (S.D. Iowa 2005).

³¹⁰ *E.g.*, *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) (“little explanation is required” for within-guideline sentence, but judge must “carefully articulate the reasons she concludes that [a non-guideline sentence] is appropriate for that defendant”); *United States v. Hardin*, 437 F.3d 463 (5th Cir. 2006) (reasons for sentence outside guidelines “should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant”); *United States v. Armendariz*, 451 F.3d 352 (5th Cir. 2006) (court may not “deviate[] from the advisory Guidelines range without articulating valid, fact-specific reasons for doing so.”).

³¹¹ *Blakely*, 542 U.S. at 305 & n.8 (emphasis in original).

courts that they are free to consider “[a]ny information . . . without regard to its admissibility under the rules of evidence,” including hearsay, “so long as it has sufficient indicia of reliability to ensure its probable accuracy.” The Commission’s recommended procedures have had disastrous results for fairness and accuracy,³¹² as five Supreme Court justices finally recognized in *Blakely* and *Booker*.³¹³ After *Booker*, most courts of appeals have held that the district courts may use the Commission’s recommended procedures, but have stopped short of saying they must. The Eighth Circuit, however, has held that it is error for a court to accord more protection than U.S.S.G. § 6A1.3 “requires,” unless the sentencing enhancement is a “tail which wags the dog of the substantive offense.” See *United States v. Okai*, ___F.3d___, 2006 WL 2011338 **2-3 (8th Cir. July 20, 2006). This is wrong on several levels. First, even assuming that the Constitution does not require more protection than the Commission recommends, the guidelines are supposedly advisory. Second, for the reasons below, it seems that the Constitution does require more protection than the Commission recommends, particularly in circuits like the Eighth where sentencing courts are directed to treat the guidelines as “presumptively reasonable advice.” *Id.* at *3. Third, this approach may violate separation of powers in that it essentially attributes Article III power to the Sentencing Commission. *Mistretta*, 488 U.S. at 408.

1. Fifth Amendment Due Process Right to Proof Beyond a Reasonable Doubt

The *Booker* Court did not address what standard of proof the Fifth Amendment requires for sentence enhancing facts, in either the advisory guideline system the remedial opinion required, or in the presumptive guideline system that has re-arisen from its unconstitutional ashes.

In 1970, the Supreme Court held in *In re Winship* that the Due Process Clause requires proof beyond a reasonable doubt of facts that could result in loss of liberty in a juvenile delinquency proceeding.³¹⁴ The Court explained: “The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose enforcement lies at the foundation of the administration of our criminal law.”³¹⁵ As Justice Harlan elaborated in concurrence, the function of a standard of proof as embodied in the Due Process Clause is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of

³¹² See, e.g., *Kandirakis*, 2006 WL 2147610 at *13; Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission (July 19, 2006), Memorandum at 1-6, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/defender_letter_to_ussc_71906.pdf; American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463, 1467-69, 1500-01 (2001); Julie O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. Rev. 1342 at 1351, 1393-94 (1997).

³¹³ See *Blakely*, 542 U.S. at 311-12 (“Any evaluation of *Apprendi*’s ‘fairness’ to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment [citing to 21 U.S.C. § 841] based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.”); *Booker*, 543 U.S. at 304 (“judges determine ‘real conduct’ on the basis of bureaucratically-prepared, hearsay-riddled presentence reports”) (Scalia, J., dissenting in part); *id.* at 319 n. 6 (the Court has corrected the Commission’s “mistaken belief” that a preponderance of the evidence satisfies due process) (Thomas, J. dissenting in part).

³¹⁴ 397 U.S. 358, 368 (1970).

³¹⁵ *Id.* at 363.

adjudication.³¹⁶ In a civil suit for money damages, the preponderance standard is acceptable because “we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor.”³¹⁷ But, the Court said, “[w]here one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden * * * of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.”³¹⁸ *Winship* involved factfinding by a judge and it did not literally result in “conviction” of a “crime.” The Court held that those distinctions made no difference; the potential loss of liberty required proof beyond a reasonable doubt.³¹⁹

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court made clear that the facts to which the beyond a reasonable doubt standard applied were not just those that go to guilt or innocence but those that increase punishment. Maine’s homicide law punished an intentional or criminally reckless killing as murder by life imprisonment, unless the defendant proved by a preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it was punished as manslaughter by a fine or imprisonment up to 20 years.³²⁰ The Court held that this burden-shifting scheme violated Due Process by relieving the state of the burden of proving facts supporting a life sentence beyond a reasonable doubt and permitting a defendant to be sentenced to life when the evidence indicated it was as likely as not that he deserved a significantly lesser sentence.³²¹ The Court explained:

[T]he criminal law of Maine . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less blameworthy, they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.

The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. . . . *Winship* is

³¹⁶ *Id.* at 370.

³¹⁷ *Id.* at 371-72.

³¹⁸ *Id.* at 363-64; *id.* at 370, 371-72 (Harlan, J, concurring). See also *Addington v. Texas*, 441 U.S. 418, 423 (1979) (“standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision,” holding that clear and convincing standard is required for civil commitment).

³¹⁹ *Winship*, 397 U.S. at 365-66.

³²⁰ *Mullaney*, 421 U.S. at 691-92.

³²¹ *Id.* at 703-04.

concerned with substance rather than this kind of formalism.³²²

Eleven years later, in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court adopted a formalistic approach, holding that legislatures are free to designate particular facts as either elements or sentencing factors, with Fifth and Sixth Amendment protections attaching to the former but not the latter, absent a legislative purpose to evade constitutional requirements, which may be evidenced by a sentencing enhancement that is a “tail which wags the dog of the substantive offense.” For the next thirteen years, *McMillan* provided cover for mandatory sentencing laws and presumptive sentencing guidelines bereft of constitutional procedural protections.

In *Apprendi v. New Jersey*, however, the Court reaffirmed *Winship* and *Mullaney*. “Since *Winship*, we have made clear beyond peradventure that *Winship*’s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’ This was a primary lesson of *Mullaney*”³²³ In *Blakely*, and then *Booker*, the Court firmly rejected *McMillan*’s proposition that how a legislature labels a fact can determine whether constitutional rights apply.³²⁴

Further, the *Apprendi* Court made clear that the Fifth Amendment right to due process of law (which is concerned with accuracy and fairness) is distinct from the Sixth Amendment right to jury trial (which is concerned with reserving control in the people against government power).³²⁵ This is also clear from *Winship*, which held that judges must use a beyond a reasonable doubt standard when loss of liberty is at stake. Thus, *Booker*’s resolution of the Sixth Amendment issue did not entail a resolution of what standard of proof a judge must use in order to comply with the Fifth Amendment.³²⁶

Justice Thomas, however, stated in his dissent from the remedial decision in *Booker* that the Fifth Amendment requires judges to find enhancing facts by proof beyond a reasonable doubt:

The commentary to § 6A1.3 states that ‘[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.’ The Court’s holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

Booker, 543 U.S. at 319 n.6.

Thus, the judicial use of a preponderance standard in the old presumptive guideline system always did violate the Due Process Clause, and continues to do so after *Booker* at least in those courts

³²² *Id.* at 697-99 (internal citations and quotation marks omitted).

³²³ 530 U.S. 466, 484 (1999) (citation omitted). See also *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”).

³²⁴ *Blakely*, 542 U.S. at 301-02 & n.5; *Booker*, 543 U.S. at 244.

³²⁵ *Apprendi*. 530 U.S. at 476-77.

³²⁶ *Kandirakis*, 2006 WL 2147610 at **32-33; *United States v. Grier*, 449 F.3d 558, 578-82 (3d Cir. 2006) (Sloviter, J., dissenting), *vacated for rehearing en banc*, 453 F.3d 554 (3d Cir. 2006).

that treat the guidelines as presumptive.³²⁷ This conclusion is bolstered by the Supreme Court's burden-shifting cases, which hold that the burden of rebutting a presumption that supports a harsher penalty may not be shifted to the defendant without proof beyond a reasonable doubt of the operative facts supporting the presumption. See *Ulster County v. Allen*, 442 U.S. 140, 157 (1979); *Mullaney*, 421 U.S. at 704; Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 Fed. Sent. R. 170 (Feb. 2006).

Even in courts that treat the guidelines as advisory, calculation of the guideline range is the starting point, must be considered, and therefore must be calculated accurately. The courts certainly have no discretion, *via* § 3553(a), to calculate the guideline range *inaccurately*. Because the guidelines still impact sentence length even when treated as truly advisory, the Ninth Circuit has reaffirmed its pre-*Booker* caselaw holding that the Due Process Clause requires a clear and convincing standard of proof for facts that have a disproportionate effect on the sentence relative to the conviction: "The continuing obligation of the district courts to calculate accurately the appropriate Guidelines sentence triggers the very same due process concerns which led to the 'disproportionate impact' rule in the first place. . . . As the concern with accuracy remains critical, so does the concern that enhancements having a drastic impact be determined with particular accuracy."³²⁸ So has the Eighth Circuit, a presumptive guideline circuit, reaffirmed its pre-*Booker* caselaw holding that a preponderance of the evidence standard does not comport with due process when a guideline enhancement functions as a "tail which wags the dog of the substantive offense."³²⁹

Before the line of cases culminating in *Booker*, at least four other courts of appeals held or stated in *dicta* that a heightened standard of proof was required for facts with a significant, disproportionate, unreliable, or otherwise unfair impact on the sentence.³³⁰ Defense counsel should argue that this due process rationale still applies after *Booker*, but it begs the question, why not proof beyond a reasonable doubt? If guideline facts still have an impact on sentence length whether treated as advisory as in the Ninth Circuit or presumptive as in the Eighth Circuit, and the Due Process Clause requires proof beyond a reasonable doubt to ensure the accuracy of facts that have an impact on sentence length as *Winship*, *Mullaney*, and *Apprendi* hold, it follows that beyond a reasonable doubt rather than clear and convincing evidence is required.

A panel of the Third Circuit recently held, over vigorous dissent, that the preponderance standard may be used to find that the defendant committed a separate felony because the guideline range "merely serves as one of a number of factors to be considered in fashioning the ultimate sentence," the defendant therefore had no right to jury trial, and this "ineluctably means that he or she does not enjoy the right to proof beyond a reasonable doubt."³³¹ In a different part of the same opinion, the majority essentially made the due process argument without appreciating its significance:

District courts are required, under 18 U.S.C. § 3553(a), to consider the range prescribed by the Guidelines in imposing sentence on a defendant. . . . The only manner by which this range can be determined is through a series of factual findings, adjusting the defendant's offense level and criminal history category. An error in these findings will result in an error

³²⁷ *Kandirakis*, 2006 WL 2147610 at **24-26, 32-36, 38 n.78.

³²⁸ *United States v. Staten*, 450 F.3d 384, 392-94 (9th Cir. 2006).

³²⁹ *Okai*, 2006 WL 2011338 at **2-3, citing *United States v. Townley*, 929 F.2d 365, 369-70 (8th Cir. 1991).

³³⁰ See *United States v. Shonubi*, 103 F.3d 1085, 1087-92 (2d Cir. 1997); *United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.D.C. 1992); *United States v. Trujillo*, 959 F.2d 1377, 1382 (7th Cir. 1992); *United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990).

³³¹ *United States v. Grier*, 449 F.3d 558, 564, 567 (3d Cir. 2006).

in the recommended sentencing range and, thus, will necessarily impact the district court's assessment of the factors of 18 U.S.C. § 3553(a).³³²

The Third Circuit has now vacated the panel decision for rehearing *en banc*. It has ordered counsel to address whether the “Due Process Clause creates a right to proof beyond a reasonable doubt as applied to certain facts relevant to enhancements under the advisory United States Sentencing Guidelines regime in light of *United States v. Booker*, 543 U.S. 220 (2005), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and, if so, which facts.”

A number of district courts after *Booker* have determined that the beyond a reasonable doubt standard is required to ensure the accuracy of guideline factfindings because they are still critically important to sentence length.³³³ Other district courts use the reasonable doubt standard as a means of informing themselves of how reliable the advisory guideline range is and how much confidence they should place in it.³³⁴ This approach has been approved by the Second and Tenth Circuits.³³⁵

Another approach is to argue that proof beyond a reasonable doubt, and cross-examination as well, is necessary to avoid unwarranted disparity, as required by § 3553(a)(6). As the Commission has said, “research suggested significant disparities in how [the relevant conduct] rules were applied,” and “questions remain about how consistently it can be applied,” given that “disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators.”³³⁶ In a recent letter to the

³³² *Id.* at 570-71.

³³³ See *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027 & n.8 (D. Neb. 2005)(Bataillon, J.) (“In order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant’s sentence.”); *United States v. Pimental*, 367 F. Supp. 2d 143, 153-54 (D. Mass. 2005)(Gertner, J.) (“[E]ven if the Sixth Amendment’s jury trial guarantee is not directly implicated because the regime is no longer a mandatory one, the Fifth Amendment’s Due Process requirement [from which the beyond a reasonable doubt standard of proof arises] is. . . . If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt.”); *Kandirakis*, 2006 WL 2147610 at *35 (“Judges Gertner and Bataillon are, of course, correct. The Fifth Amendment and its *current* Supreme Court interpretation require proof beyond a reasonable doubt of enhancement facts.”); *United States v. Coleman*, 370 F.Supp.2d 661, 668 (S.D. Ohio 2005) (“This Court believes that all enhancements should be determined by beyond a reasonable doubt, but, in light of *Yagar’s* dicta and the multi-circuit consensus, the Court will continue to review enhancements, with the exception of those relating to acquitted conduct, by a preponderance of the evidence.”). Cf. *United States v. Carvajal*, 2005 WL 476125 **4 (S.D.N.Y. Feb. 22, 2005) (declining to consider acquitted conduct in order to properly respect the jury’s findings).

³³⁴ *United States v. Gray*, 362 F.Supp.2d 714, 720-24 (S.D. W. Va. 2005); *Kandirakis*, 2006 WL 2147610 at *32-33.

³³⁵ *United States v. Dazey*, 403 F.3d 1147, 1177 (10th Cir. 2005) (“District courts might reasonably take into consideration the strength of the evidence in support of sentencing enhancements, rather than (as in the pre- *Booker* world) looking solely to whether there was a preponderance of the evidence, and applying Guidelines-specified enhancements accordingly.”); *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005) (holding that district courts are not required to count acquitted conduct; “Rather, district courts should consider the jury’s acquittal when assessing the weight and quality of the evidence presented by the prosecution and determining a reasonable sentence.”)

³³⁶ Fifteen Year Report at 50. See also David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 S.M.U. L. Rev. 211, 222 (2004) (discussing “increase in ‘dry conspiracies’ where no drugs were ever seized by the police and the conviction and sentence depended entirely on the dubious testimony of cooperating witnesses, even when many of these had been higher up in the chain than the defendant on trial.”).

Sentencing Commission, the Federal Defenders gave several examples of how unreliable factfinding under the guidelines' recommended procedures results in unwarranted disparity.³³⁷

2. Fifth Amendment Due Process Right to be Sentenced on the Basis of Accurate Information

Several circuits have held that the mere inclusion of factual allegations in a PSR transforms them to "evidence" which the judge may adopt without the government introducing any actual evidence to support them; the burden is then shifted to the defendant to rebut this multi-level hearsay with actual evidence.³³⁸ The origin of this jurisprudence is the Commission's policy statement.³³⁹ Other circuits hold that the PSR is not evidence, and, therefore, the prosecution must introduce evidence in support of disputed facts.³⁴⁰ As noted above, the Commission itself and the Supreme Court recognize that the information upon which guideline enhancements are based is often unreliable. As Judge Young puts it: "The system relies on 'findings' that rest on 'a mishmash of data[,] including blatantly self-serving hearsay largely served up by the Department [of Justice]."³⁴¹ Such "procedures" turn accuracy and fairness on their head. The guidelines' "probable accuracy" standard violates the Due Process Clause. Even in a purely discretionary system in which factfinding had no quantifiable effect at all, defendants had a right under the Due Process Clause to be sentenced on the basis of "accurate" information, not "probably

³³⁷ Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission (July 19, 2006), Memorandum at 1-6 & Appendix, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/defender_letter_to_ussc_71906.pdf

³³⁸ See *United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005) ("PSR generally bears 'sufficient indicia of reliability,'" defendant must rebut with "countervailing proof . . . beyond defendant's self-serving words"); *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999) ("sentencing judge may consider [PSR] as evidence in making the factual determinations," and "defendant's rebuttal evidence must demonstrate that the information contained in the PSR is 'materially untrue, inaccurate or unreliable,' and '[m]ere objections do not suffice"); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997) ("When the district court adopts the PSR's findings [here, probation officer's extrapolation of weight from dollar amounts mentioned by drug addicted informant who did not testify in person], the defendant must offer more than a bare denial of its factual allegations to mount a successful challenge."); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990) ("defendant has an affirmative duty to make a showing that the information in the presentence report is unreliable," and unless the defendant carries that burden, the "court is 'free to adopt the findings of the [presentence report] without more specific inquiry or explanation."). The Ninth Circuit treats the PSR as "evidence" without requiring actual evidence, though perhaps not going so far as to require rebuttal by the defendant. See *United States v. Maldonado*, 215 F.3d 1046, 1051 (9th Cir. 2000) ("district court may, without error, rely on evidence presented in the PSR to find by a preponderance of the evidence that the facts underlying a sentence enhancement have been established").

³³⁹ The cases cite to prior cases that cite the assertion in § 6A1.3 that the court is free to rely on "information without regard to its admissibility under the rules of evidence," so long as it has "sufficient indicia of reliability" to support its "probable accuracy." See *United States v. Marin-Cuevas*, 147 F.3d 889, 894-95 (9th Cir. 1998); *United States v. Parker*, 133 F.3d 322, 329 (5th Cir. 1998); *United States v. Mumford*, 25 F.3d 461, 467 (7th Cir. 1994). These courts have either dropped the notion of "indicia of reliability" altogether or declared, *ipse dixit*, that the PSR is reliable.

³⁴⁰ See *United States v. Keifer*, 198 F.3d 798, 800 (10th Cir. 1999); *United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997); *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996); *United States v. Greene*, 71 F.3d 232, 236 (6th Cir. 1995); *United States v. Wise*, 976 F.2d 393, 402-03 (8th Cir. 1992); *United State v. Gessa*, 971 F.2d 1257, 1266 n.7 (6th Cir. 1992); *United States v. Prescott*, 920 F.2d 139, 143-44 (2^d Cir. 1990).

³⁴¹ *Kandarakis*, 2006 WL 2147610 at *13 (citation omitted).

accurate" information, not "misinformation," and not facts that are "materially untrue." See *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (defendant has a right under the Due Process Clause to be sentenced on the basis of accurate information about his criminal history); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (defendant has a right under the Due Process Clause not to be sentenced based on "misinformation" or facts that are "materially untrue").

3. Sixth Amendment Right to Confront and Cross-Examine Witnesses

The guidelines' invitation to use hearsay may well violate the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court applied the Confrontation Clause to bar the use at trial of out-of-court testimonial statements, including statements to law enforcement officers, regardless of whether the court deems the statement reliable. Following *Crawford* and *Booker*, the courts have questioned the continuing use of testimonial hearsay at sentencing. See *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005) ("While [the *Crawford*] rule may eventually be extended to the sentencing context, that has not happened yet."); *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006) (*Blakely*, *Booker* and *Crawford* "may be a broad signal of the future," but declining to require *Crawford* at sentencing "without a clear directive from the Supreme Court."); *United States v. Gray*, 362 F.Supp.2d 714, 724-25 (S.D. W. Va. 2005) ("*Crawford v. Washington* . . . has breathed new life into the debate," but "[i]n the absence of . . . mandatory, fact-driven penalty determinations, . . . I cannot find that I am required to apply *Crawford* at sentencing.").

The courts have declined to require confrontation rights at sentencing either because the Supreme Court has not yet directed them to do so, or because the guidelines are no longer mandatory, or because *Williams v. New York*, 337 U.S. 241 (1949) has not been specifically overruled. See *United States v. Littlejohn*, 444 F.3d 1196, 1198-1200 (9th Cir. 2006); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005).

The guidelines are effectively mandatory in a majority of courts. Moreover, *Williams v. New York* is inapposite whether the guidelines are treated as advisory or mandatory. *Williams* held that a defendant had no right in a *purely discretionary state* sentencing system where the judge could impose a sentence based on "no reason at all," 337 U.S. at 252, to notice and an opportunity to confront adverse witnesses. This was based solely on principles of federalism, *i.e.*, the need to allow states to experiment with progressive sentencing systems with a rehabilitative focus. The Court did not address what procedures were required in such a system, other than to say sentencing was not immune from due process scrutiny. *Id.* at 252 n.18 (citing *Townsend v. Burke*, 334 U.S. 736 (1948), which held that defendants had a right to be sentenced on the basis of accurate information). In *United States v. Tucker*, 404 U.S. 443 (1972), the Court held that a defendant in a pre-guidelines federal bank robbery case had a right under the Due Process Clause not to be sentenced based on "misinformation" or facts that were "materially untrue." *Id.* at 447. In *Gardner v. Florida*, 430 U.S. 349 (1977), the Court held that a sentence based on undisclosed facts in a PSR violates Due Process Clause; although this was a capital case, the Court specifically did not rely on the Eighth Amendment but on the Due Process Clause, which would make it applicable to all sentencing proceedings. In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court held that a state defendant had a right to notice, hearing and counsel on offender characteristics that could raise the sentence. Thus, any suggestion in *Williams* that there is no right to procedures designed to ensure accuracy in sentencing -- even in a purely discretionary system -- has long been abandoned. Since the lower courts are nonetheless still waiting for the Supreme Court to explicitly overrule *Williams*, this issue should be raised in petitions for certiorari.

In the meantime, defense counsel should strongly urge the use of hearings with live witnesses and cross-examination. See U.S.S.G. § 6A1.3(a) ("When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."); *id.*, comment. (backg'd.) ("An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues."); *Gray*, 362 F. Supp.2d at 725 ("For hotly contested issues, however, the truth-seeking function of the Confrontation Clause deserves attention at sentencing. . . . The adversarial system provides the best method of establishing the reliability of testimonial evidence and the appropriate weight to assign to such evidence. Accordingly, I strongly

encourage the use of witness testimony and cross-examination to resolve factual disputes at sentencing, notwithstanding my finding that *Crawford* does not apply at sentencing under the post-*Booker* sentencing regime.”). Cf. *Kandirakis*, 2006 WL 2147610 at *31 (explaining court’s use of jury factfinding as advice, in part because the result is likely to be more accurate since, unlike the court which must consider extra-evidence data like the pre-sentence report, the jury considers only those data that pass muster under the rules of evidence which exist to serve truth-seeking).

4. Fifth Amendment Due Process Right to Notice

There is a circuit split regarding whether a defendant must receive notice of a district court’s intent to impose a sentence above the guideline range for reasons other than a guideline departure.³⁴² The courts that have held no notice is required have said there is no “unfair surprise” because sentencing is discretionary, includes a review of the unlimited factors set forth in § 3553(a), and defendants are aware of that.³⁴³ According to circuits that treat the guidelines as presumptive, there is nonetheless no due process problem because defendants have notice of *Booker*, § 3553(a), and the statutory maximum.³⁴⁴ The Eleventh Circuit has said that lack of notice is not plain error because there is no precedent establishing that Rule 32(h) survives *Booker*.³⁴⁵ The courts that have held that notice is required have relied on Rule 32(h) and due process of law.³⁴⁶ This is an issue of constitutional dimension, though it may not be plain error, depending on the circuit. Thus, defense counsel should object and seek a continuance in the district court, and raise the issue on appeal and in petitions for certiorari. In *Burns v. United States*, 501 U.S. 129 (1991), the Supreme Court interpreted a prior version of Fed. R. Crim. P. 32 to require that “before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government,” the district court must “give the parties reasonable notice that it is contemplating such a ruling,” and “must specifically identify the ground on which the district court is contemplating an upward departure.” *Id.* at 138-39. The *Burns* holding was then incorporated into Rule 32 as subsection (h). The Court interpreted Rule 32 to require notice to ensure that it complied with the Due Process Clause. The Court noted that the guidelines place no limit on the number of grounds for a sentence outside the guideline range, a due process concern that is more pronounced after *Booker*, not less. Efficiency was also a concern, for reasons just as applicable to sentencing under § 3553(a). The Court said:

“Th[e] right to be heard has little reality or worth unless one is informed” that a decision is contemplated. . . . Because the Guidelines place essentially no limit on the number of potential factors that may warrant a departure, no one is in a position to guess when or on what grounds a district court might depart, much less to “comment” on such a possibility in a coherent way. . . . At best, under the Government’s rendering of Rule 32, parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative. At worst, and more likely, the parties will not even try to anticipate such a development; where neither the presentence report nor the attorney for the Government has suggested a ground for upward departure, defense counsel might be reluctant to suggest

³⁴² Compare *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006) (no notice required); *United States v. Walker*, 447 F.3d 999 (7th Cir. 2006) (same); *United States v. Egenberger*, 424 F.3d 803 (8th Cir. 2006) (no notice required); *United States v. Simmerer*, 156 Fed. Appx. 124 (11th Cir. 2005) (lack of notice was not plain error) with *United States v. Evans-Martinez*, 448 F.3d 1163 (9th Cir. 2006) (lack of notice was plain error); *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006) (lack of notice was error); *United States v. Dozier*, 444 F.3d 1215 (10th Cir. 2006) (same).

³⁴³ See *Vampire Nation*, 451 F.3d at 196; *Walker*, 447 F.3d at 1006-07.

³⁴⁴ See *Walker*, 447 F.3d at 1007 n.7; *Egenberger*, 424 F.3d at 805-06.

³⁴⁵ See *Simmerer*, 156 Fed. Appx. 124 at *3.

³⁴⁶ See *Evans-Martinez*, 448 F.3d at 1166-67; *Davenport*, 445 F.3d at 371; *Dozier*, 444 F.3d at 1127-28.

such a possibility to the district court, even for the purpose of rebutting it. In every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines.

. . . Notwithstanding the absence of express statutory language, this Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals *both* notice *and* a meaningful opportunity to be heard.

. . . The Court has likewise inferred other statutory protections essential to assuring procedural fairness. . . . In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause. *Burns*, 501 U.S. at 136-138 (internal citations omitted). In holding that notice is required after *Booker*, the Fourth Circuit recognized that notice ensures accuracy, and that a defendant may not be sentenced on the basis of materially false information.³⁴⁷ The position of the Seventh and Eighth Circuits that lack of notice does not offend due process because sentencing is discretionary is at odds with their position that the guidelines are presumptive. Even in circuits where the guidelines are not presumptive, “the district court must correctly calculate the applicable range, which serves as a ‘starting point’ in sentencing. The district court then has the discretion to sentence both above and below the range suggested by the Guidelines. Parties must receive notice the court is contemplating such a possibility in order to ensure that issues with the potential to impact sentencing are fully aired.”³⁴⁸ Of note, DOJ’s position is that due process requires notice.³⁴⁹ One of the rationales offered by the Third Circuit is that notice would be “unworkable” because *Booker* contemplates that sentence will be imposed after the court considers the advisory guidelines, the defendant’s allocution, victim statements, other evidence, and the § 3553(a) factors, and is especially concerned that no one can predict what victims will say or what effect their statements will have.³⁵⁰ Sentencing courts have always been required to impose sentence after considering the guidelines, the defendant’s allocution, victim statements, any evidence produced at the hearing, and any grounds for departure. This did not make notice “unworkable,” and more importantly, any resulting inconvenience did not and could not overcome due process requirements. The Third Circuit’s concern about the unpredictability of victim impact statements is troubling. As the Tenth Circuit recognized, if the judge forms an intent to increase the sentence based on a victim’s statement, the defendant must be given an opportunity to respond.³⁵¹ This is especially true if the victim made an oral statement, the content of which the defendant had no notice. Courts must take care to ensure that defendants’ constitutional rights take precedence over victims’ statutory rights.³⁵²

C. Right to be Sentenced by an Independent Judge/Separation of Powers

Following *Booker*, judges have been heard to say that the possibility of a legislative fix is and even should be a concern in sentencing. If this means writing careful decisions considering the purposes and factors under § 3553(a), it is perfectly appropriate. If it means hewing to the guidelines, it is not. If the judge is on record to this effect, the judge’s impartiality should be challenged. The current situation is probably unique, but the analogous problem of pressure on judges from outside the courtroom arises in other contexts. Here are a few examples. In *United States v. Spudic*, 795 F.2d 1334 (7th Cir. 1986), the

³⁴⁷ *Davenport*, 445 F.3d at 371 (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948)).

³⁴⁸ See *Evans-Martinez*, 448 F.3d at 1167.

³⁴⁹ See *Walker*, 447 F.3d at 1007 n.7.

³⁵⁰ *Vampire Nation*, 451 F.3d at 197 & n.4.

³⁵¹ *Dozier*, 444 F.3d at 1127-28.

³⁵² See *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006).

Seventh Circuit disapproved of the judge's practice of meeting with a group of probation officers to determine "appropriate and fair sentences not disproportionate from other sentences in like cases." This practice was inconsistent with "rudimentary notions of fairness" because, *inter alia*, it "may have an unrecognized influence on the sentencing judge causing the judge to abide by council consensus," and "the further concern that the impact of what is subsequently presented in open court at sentencing will be minimized, that the sentence will be foreordained, and that the judge therefore enters the actual sentencing hearing without an open mind." *Id.* at 1343. In *United States v. Brigham*, 447 F.3d 665 (9th Cir. 2006), two judges in the majority of a panel of the Ninth Circuit held that it was not plain error for the judge to participate in a "sentencing council" of judges in that district, the purpose of which was to reduce disparity. After meeting with the sentencing council, the judge imposed a 37-month sentence where the plea agreement called for 24 months. The majority made clear that it was not holding that this was or was not error, only that it was not plain error. The third judge concurred in the judgment (an *Ameline* remand), but wrote separately to disagree with the holding that use of a sentencing council in determining the defendant's sentence was not plain error: "In addition to constituting a troubling *ex parte* communication, the use of a sentencing council erodes the well-established principle that federal judges should be independent and insulated from group pressures. Article III provides life tenure and undiminished due compensation to federal judges to preserve their autonomy." *Id.* at 672 (Ferguson, J., concurring in the judgment). Further, "early constitutional debates in this country underscore the importance of judicial independence and insulation:

[The] independence of . . . judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which . . . the influence of particular conjunctures . . . sometimes disseminate among the people themselves, and . . . have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."

Id., quoting The Federalist No. 78 (Alexander Hamilton). In *Mistretta*, the Supreme Court was "troubled" by the argument that the Judiciary's "entanglement in the political work of the Commission" would undermine judicial impartiality in appearance or in fact, but concluded, "not without difficulty," that it would not. This was because the Commission was expected to engage in the "essentially neutral endeavor" of developing sentencing rules for judges to apply. The Court concluded that "the Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing. In this case, at least, where the subject lies so close to the heart of judicial function and where the purposes of the Commission are not inherently partisan, such enlistment is not coercion or co-optation, but merely assurance of judicial participation." See *Mistretta*, 488 U.S. at 407-08.