
ESSAY

UNITED STATES V. BOOKER: SYSTEM FAILURE OR SYSTEM FIX?

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INTRODUCTION

Six years ago, the Supreme Court held in *United States v. Booker* that the mandatory sentencing guidelines system was unconstitutional.¹ Since this decision, Congress has given a great deal of attention to federal sentencing and the changes that have resulted from *Booker* and its progeny. Recently, the Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security, of which I am the ranking member, held a hearing to examine what has happened during the six years after *Booker*. Despite what critics of the decision and those wary of judicial discretion claim, the *Booker* decision did not create a problem that needs fixing. *Booker* was the fix—not the problem. This is even clearer today than it was at the time *Booker* was decided.

Yet the discourse in Congress on federal sentencing and *Booker* has not changed and, in some ways, has become more distorted. After more than thirty years of working on criminal justice reform at the state and federal level, I have learned that when it comes to crime policy, we have a choice—we can reduce crime or we can play politics. Reducing crime requires science and evidence-based strategies that have been proven to positively impact crime statistics. Playing politics, on the other hand, involves basing crime policy on slogans and sound bites that appeal to emotion. “Three strikes, you’re out,” “life without parole,”

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¹ *United States v. Booker*, 543 U.S. 220, 226-27 (2005).

“abolish parole,” “mandatory minimum sentencing,” and “truth in sentencing” are examples of such slogans and sound bites. Nowhere is this truer than in the conversation about federal sentencing.

I. BACKGROUND

As part of the Sentencing Reform Act of 1984 (SRA), Congress established the U.S. Sentencing Commission, which was charged with establishing and maintaining a system of sentencing guidelines for the federal courts.² The Federal Sentencing Guidelines (Guidelines) have proven controversial since their inception, with conservatives and prosecutors alleging that judges try to coddle criminals by eluding the Guidelines, while defense attorneys and some judges counter that the Guidelines have resulted in excessive sentencing for many defendants and a restrictive focus on incarceration. More than two decades after the SRA’s enactment, this debate continues.

The stated goals of the SRA were to provide: (1) guidance to judges with a “comprehensive and consistent statement” of law outlining the purposes of sentencing, the kinds of sentences available to serve those purposes, and the factors to be considered in imposing a sentence, including but not limited to the Guidelines; (2) “fairness” in sentencing, meaning individualized sentencing and a reduction in “unwarranted . . . disparity”; (3) “certain[ty]” that the sentence imposed would be the sentence served, and certainty about the reasons for the sentence; and (4) a full range of sentencing options from which to choose the most appropriate sentence in a particular case in order to reduce the use of imprisonment.³

On June 24, 2004, the Supreme Court decided *Blakely v. Washington*.⁴ In *Blakely*, the Court struck down the Washington State Sentencing Guidelines as unconstitutional,⁵ placing the validity of the federal Guidelines in the gravest doubt and casting a shadow of deep uncertainty over many state sentencing systems. The Court held that the imposition of an enhanced sentence based on factors that were presented at sentencing and found to exist by a preponderance of evidence by the sentencing judge, rather than by a jury beyond a reasonable doubt, violated the defendant’s Sixth Amendment right to a trial

² Pub. L. No. 98-473, 98 Stat. 1987, 2017 (codified at 28 U.S.C. § 991 (2006)).

³ S. REP. NO. 98-225, at 39, 50-59 (1983).

⁴ 542 U.S. 296 (2004).

⁵ *Id.* at 305.

by jury.⁶ In reaching its result in *Blakely*, the Court relied on a rule it first announced in *Apprendi v. New Jersey*: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁷ Prior to *Blakely*, most assumed that *Apprendi*’s rule applied only where a sentencing finding of fact could raise the defendant’s sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction. In *Blakely*, however, the Court found that “the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*,” and, hence, even a sentence below the statutory maximum can violate the Sixth Amendment.⁸ Thus, the statutory maximum for purposes of sentencing in *Blakely* was the statutorily sanctioned sentencing guideline maximum for the offense of conviction; a fact that increases a defendant’s “statutory maximum” must be found by a jury.⁹

In the wake of the *Blakely* decision, some federal judges concluded that *Blakely* rendered the federal sentencing system unconstitutional.¹⁰ Other judges continued to apply the Guidelines system.¹¹ In the aftermath of the confusion and in an effort to save the Guidelines, Congress considered a temporary statutory fix. The most prominent of proposed “fixes” was the “Bowman Fix,” named for its author, Professor Frank Bowman. In essence, this fix would have taken the top off the guideline ranges, thus making the maximum sentence for conviction the maximum in the statutory penalty provision for the offense.¹² The bottom range would continue to be binding, and any consideration the court took into account in sentencing the defendant beyond the minimum would be in the discretion of the court, guided by general sentencing considerations and reason.¹³ However, because of doubts that such a measure could withstand a constitutional challenge, and given the decision by the Supreme Court to decide post-*Blakely* appeals on an expedited basis, Congress took no action on the proposals.

⁶ *Id.* at 304-05.

⁷ *Id.* at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

⁸ *Id.* at 303 (internal quotation marks omitted).

⁹ *Id.*

¹⁰ *See, e.g.*, *United States v. Mueffelman*, 327 F. Supp. 2d 79, 82 (D. Mass. 2004).

¹¹ *See, e.g.*, *United States v. Koch*, 383 F.3d 436, 437 (6th Cir. 2004) (en banc).

¹² Memorandum from Frank Bowman to U.S. Sentencing Comm’n 7 (June 27, 2004), available at http://sentencing.typepad.com/sentencing LAW_and_policy/2004/07/white_knight_or.html.

¹³ *Id.* at 7-8.

On January 12, 2005, the Supreme Court issued its opinion in *Booker* and *United States v. Fanfan*.¹⁴ The Court rendered its judgment in two separate opinions—one from Justice Stevens, and one from Justice Breyer—answering two basic questions: (1) Other than a prior conviction, must any fact necessary to support an enhanced sentence be admitted by the defendant or found by a jury? and (2) If yes, should judges still be permitted to use the Guidelines on an advisory rather than a mandatory basis?¹⁵ Both questions were answered in the affirmative¹⁶ and decided by a five-four vote, with Justice Ruth Bader Ginsberg being the only justice voting in the majority for each question. In answering the first question, the Court ruled that the Guidelines denied criminal defendants their Sixth Amendment protection, as they permitted judges to consider evidence and issues that were never presented to a jury for consideration and, furthermore, that were being judged by a “preponderance of the evidence” standard rather than the constitutionally required “beyond a reasonable doubt” standard employed by juries.¹⁷ In answering the second question, the Court excised two provisions from the SRA:¹⁸ 18 U.S.C. § 3553(b)(1) (the provision making the Guidelines mandatory in all cases) and 18 U.S.C. § 3742(e) (setting forth a *de novo* standard for appellate review of departures below the Guidelines—the result of the controversial *Feeney* amendment¹⁹). The result was an invalidation of the Guidelines’ mandatory status, reducing their application to an “advisory” one. Under the remaining provisions of the statute, however, sentencing judges must still “consult those Guidelines and take them into account,” in addition to considering the other statutory goals of sentencing, as provided in the SRA.²⁰ Thus, in the wake of the decision,

¹⁴ The Court decided *Booker* with a companion case, *United States v. Fanfan*. See *United States v. Booker*, 543 U.S. 220, 220 (2005).

¹⁵ *Id.* at 226-27.

¹⁶ See *id.* at 244 (Stevens, J., delivering the opinion of the court in part); *id.* at 245 (Breyer, J., delivering the opinion of the court in part).

¹⁷ *Id.* at 226-28.

¹⁸ *Id.* at 259.

¹⁹ In 2003, Congress passed an amendment introduced by U.S. Representative Tom Feeney (R-Fla.). The Feeney Amendment required that every time a federal judge reduced a sentence, that judge’s name be reported to Congress, and also provided that appellate courts review downward departures with skepticism. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650, 670, 675. Under *Booker*, that amendment has apparently been “viscerated,” since as Justice Stevens stated, “there can be no ‘departure’ from a mere suggestion.” *Booker*, 543 U.S. at 301 (Stevens, J., dissenting in part).

²⁰ *Booker*, 543 U.S. at 264.

federal judges are now free to decide for themselves whether defendants deserve sentences longer or shorter than those the Guidelines prescribe. However, these sentencing decisions are subject to reversal on appeal should they be deemed unreasonable.²¹

Importantly, as part of its decision, the Court indicated that it was incumbent on the Sentencing Commission to continue to carry out its statutory responsibility enumerated in the SRA. The Court observed, “The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process.”²² In other words, the Court found that the Sentencing Commission should continue to refine the Guidelines and, as a result, the sentencing process in general. Thus, the Sentencing Commission continues to play a critical role, even in an advisory guidelines world.

To be sure, the Supreme Court’s decision in *Booker* fundamentally changed 18 U.S.C. § 3553, the primary statute governing sentencing decisions. After *Booker*, the sentencing judge must consider the Commission’s Guidelines and policy statements, but it need not follow them. Collectively, they are just one of the many sentencing factors to be considered under § 3553(a), along with the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted sentencing disparities and provide restitution, and others.²³ The only restriction § 3553(a) places on the sentencing court is the “parsimony” provision, which requires the court to “impose a sentence sufficient, but not greater than necessary,” to achieve a specific set of sentencing purposes:

- to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- to afford adequate deterrence to criminal conduct;
- to protect the public from further crimes of the defendant; and

²¹ See *Gall v. United States*, 552 U.S. 38, 45 (2007) (noting that “reasonableness” review requires the application of an abuse-of-discretion standard).

²² *Booker*, 543 U.S. at 263 (citing 28 U.S.C. § 994 (2000)).

²³ *Id.* at 259-60.

- to provide the defendant with needed educational or vocational training, medical care,²⁴ or other correctional treatment in the most effective manner.

Booker was only the beginning of a new, truly advisory federal sentencing scheme. Since then, the Supreme Court has issued eleven decisions mapping out the advisory guidelines system that *Booker* created. In *Rita v. United States*,²⁵ *Kimbrough v. United States*,²⁶ *Gall v. United States*,²⁷ and *Cunningham v. California*,²⁸ the Supreme Court set forth what the *Booker* remedy means. Through its subsequent decisions, the Supreme Court made clear that § 3553(a) is the controlling sentencing law and that *Booker* is the starting point.

II. IMPACT OF *BOOKER* ON FEDERAL SENTENCING

In the six years since *Booker*, none of the dire predictions about rogue judges and erratic sentencing in an advisory guidelines world has come to pass. In fact, the system is functioning smoothly and operating much like the pre-*Booker* system did. The Sentencing Commission's own data reveal that great disparities in sentencing do not exist. The myth that defendants are getting off too easy is quickly debunked when one considers that judges nearly always follow the Guidelines' recommendation for a prison sentence.²⁹ To be sure, probation sentences are actually declining. For fraud offenses, 20.1% of defendants received probation without confinement in 2003,³⁰ but only 13.8% received probation without confinement in the first three quarters of

²⁴ 18 U.S.C. § 3553(a)(2) (2006).

²⁵ 551 U.S. 338, 341 (2007) (permitting presumption of reasonableness on review of a sentence within the Guidelines).

²⁶ See 552 U.S. 85, 91 (2007) (upholding district court's consideration of all § 3553(a) factors in granting significant downward variance for crack-related offenses).

²⁷ See 552 U.S. 38, 41 (2007) (mandating same standard of review regardless of whether the sentence was within the Guidelines).

²⁸ See 549 U.S. 270, 274 (2007) (finding violation of Sixth Amendment under California's sentencing guidelines where judge determined facts that led to greater than maximum sentence).

²⁹ See U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT, 3D QUARTER RELEASE 1 tbl. 1 (2011), available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2011_3rd_Quarter_Report.pdf (finding that 81% of all sentences are either within the Guidelines or a government-initiated departure).

³⁰ See U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.12, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2003/table12.pdf.

2011.³¹ For firearms offenses, 4.3% of defendants received probation without confinement in 2003,³² and 2.8% in 2011.³³ For drug traffickers, 2.2% in 2003;³⁴ 2.2% in 2011.³⁵

This nation's growing prison and jail population also belies the assertion that sentences are too lenient. Incarceration levels in the United States have more than quadrupled over the past thirty years from about 500,000 in 1980 to more than 2.3 million today.³⁶ The United States leads the world, by far, in incarceration.³⁷ Other industrialized nations lock people up at an average rate of about 125 per 100,000.³⁸ The U.S. average lockup rate is 750 per 100,000,³⁹ about five to eight times the rate of other industrialized nations.⁴⁰ Only Russia comes anywhere near the U.S. rate, with 628 per 100,000.⁴¹ When you look at the U.S. rate by race, the numbers are even more alarming—for blacks, the average rate is 2200 per 100,000, with ten states locking up blacks at a rate of almost 4000 per 100,000. Research by the Pew Center on the States established that incarceration has diminishing returns after about 350 per 100,000, and by 500 per 100,000 may even become *counterproductive*.⁴² So those states incarcerating blacks at almost 4000 per 100,000 may actually be *increasing* the crime rate by locking up so many people.

Moreover, looking solely at the federal system, the Bureau of Prisons is 37% over capacity, resulting in extreme overcrowding, unsafe conditions, and reduced capacity to provide treatment and training that has been shown to reduce recidivism.⁴³ Yet less than 30% of federal of-

³¹ U.S. SENTENCING COMM'N, *supra* note 29, at 30 tbl.18.

³² U.S. SENTENCING COMM'N, *supra* note 30, at tbl.12.

³³ U.S. SENTENCING COMM'N, *supra* note 29, at 30 tbl.18.

³⁴ U.S. SENTENCING COMM'N, *supra* note 30, at tbl.12.

³⁵ U.S. SENTENCING COMM'N, *supra* note 29, at 30 tbl.18.

³⁶ See PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=35904; see also *Incarceration*, THE SENT'G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Dec. 15, 2011).

³⁷ PEW CTR. ON THE STATES, *supra* note 36, at 5, 35 tbl.A-7.

³⁸ See MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS 2 (2003).

³⁹ PEW CTR. ON THE STATES, *supra* note 36, at 35 tbl.A-7.

⁴⁰ MAUER, *supra* note 38, at 2.

⁴¹ *Id.* at 35 tbl.A-7.

⁴² PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 18-19 (2009), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=49382.

⁴³ *Hearing Before the U.S. Sentencing Comm'n* 15-16, 49-50, 52 (Mar. 17, 2011) (statement of Harley Lappin, Director, Federal Bureau of Prisons).

fenders commit a new offense after release.⁴⁴ This low rate of recidivism is not due to our severe sentencing practices. In 2007, the JFA Institute, a nonprofit criminal justice consulting firm, issued a report concluding that “[m]ost scientific evidence suggests that there is little if any relationship between fluctuations in crime rates and incarceration rates.”⁴⁵

Incarceration is therefore a very expensive way to respond to crime, especially when it is counterproductive. Incarcerating 4000 per 100,000 means a counterproductive incarceration rate of 3500 per 100,000. At an average cost of over \$28,000 per year,⁴⁶ that would mean that \$87.5 million is spent on *counterproductive* incarceration per 100,000 residents. If you assume that 25% of a population of 100,000 consists of children, then that would mean that \$3500 per child every year is spent on unproductive incarceration. If, instead, the money were directed toward one-third of the children most at risk of becoming involved in crime, then that would equate to over \$10,000 per child every year.

The “problem” that proponents of *Booker* reform claim exists—namely that judges, now untethered from the Guidelines, are out of control—is not supported by evidence. Judges are following the Guidelines over 80% of the time,⁴⁷ despite the fact that many judges disagree with the Guidelines.⁴⁸ And the compliance rate is increasing. Notably, the rate of nongovernment-sponsored below-range sentences *dropped* to 16.9% in the third quarter of 2011, down from 18.7% in the fourth quarter of 2010.⁴⁹ This rate represents only a modest increase when it is compared with the first year after *Booker*, when many courts were still following the Guidelines as if they were mandatory pending

⁴⁴ *Cf. id.* at 30-31 (stating that about seven out of ten inmates are unlikely to commit a new offense).

⁴⁵ THE JFA INSTITUTE, UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA’S PRISON POPULATION 8 (2007), available at <http://www.countthecosts.org/sites/default/files/Unlocking-America.pdf>.

⁴⁶ The annual cost of imprisonment per inmate in 2010 was \$28,284.16. *Newly Available: Costs of Incarceration and Supervision in FY 2010*, U.S. COURTS (June 23, 2011), http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx. As of December 1, 2011, the federal prison population was 216,462. *Weekly Population Report*, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/weekly_report.jsp (last visited Dec. 1, 2011).

⁴⁷ *See supra* note 29.

⁴⁸ *See* U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010 tbl. 8 (2010) (showing, for example, that about 30% of judges think that the ranges for many drug offenses are too high).

⁴⁹ U.S. SENTENCING COMM’N, *supra* note 29, at 12 tbl. 4.

further clarification from the Supreme Court.⁵⁰ In addition, the government-sponsored below-range rate is approximately 27%.⁵¹

The drop in below-range sentences during the first three quarters of 2011 corresponds with the reduction in the crack guidelines on November 1, 2010, as directed by the Fair Sentencing Act of 2010.⁵² A 16.9% variance rate from sentencing guidelines by judges is hardly cause for alarm. Indeed, it shows that judges are sentencing within (or above) the guideline range or following the prosecutor's recommendation 83.1% of the time.⁵³

It is also notable that the government does not object to at least half of the judicial variances, even though it wins more than 60% of the cases it appeals on § 3553(a) factors.⁵⁴ And when judges choose not to follow the Guidelines, the extent of variances and departures is less than thirteen months,⁵⁵ a rate that has been stable since *Booker*,⁵⁶ and smaller than the departure rate before *Booker*.⁵⁷ Despite the modest increase in below-guideline sentences since *Booker*, "the size of their impact on sentence lengths has decreased."⁵⁸ Furthermore, judges are following the Guidelines' recommendations for the kind of sentence to impose—whether prison, probation, or an intermediate sentence such as home detention—even more than they did before *Booker*.

⁵⁰ See U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT 1 tbl. 1 (2006), available at

http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/index.cfm (reporting a rate of twelve percent in 2006).

⁵¹ U.S. SENTENCING COMM'N, *supra* note 29, at 1 tbl. 1.

⁵² Pub. L. No. 111-220, 124 Stat. 2372 (codified in scattered sections of 21 and 28 U.S.C.).

⁵³ *Id.*

⁵⁴ U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.56A, 58 (2010).

⁵⁵ *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong., app. (Oct. 12, 2011) [hereinafter *Hearings*] (statement of James E. Felman on behalf of the American Bar Association).

⁵⁶ Compare U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.31A-31D (2006), with U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbls.31A-31D (2010).

⁵⁷ U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.31A (2004).

⁵⁸ Jeffrey Ulmer & Michael T. Light, *Beyond Disparity: Changes in Federal Sentencing After Booker and Gall?*, 23 FED. SENT'G REP. 333, 340 (2011).

III. MISGUIDED CALLS FOR SENTENCING REFORM

Despite the data revealing that judges are showing great restraint in federal sentencing, there continues to exist dissatisfaction among some about the post-*Booker* sentencing system. Ever since *Booker*, there have been calls for some kind of a “fix.” These calls for reform presume something that has never been demonstrated—that there is a problem that needs fixing. Much of the discourse surrounding this need for a “fix” surrounds alleged disparities in sentencing and an unsubstantiated notion that criminal defendants are getting off too easy. The SRA was concerned only with eliminating *unwarranted* sentencing disparities. Simply focusing on the rate of disparities obscures this truth. It appears that a desire for blind uniformity at the cost of fairness is driving much of this debate.⁵⁹

Numerous individuals, including the chair of the Sentencing Commission, Judge Patti Saris, Matt Miner, and Bill Otis—all witnesses at a hearing on federal sentencing in October 2011—have called for a number of reforms, including going as far as to recommend abolishing the Sentencing Commission altogether.⁶⁰ The recommendations boil down to this: preventing sentencing judges from imposing sentences outside of the guideline range. They seek to accomplish this by requiring that the Guidelines be given “substantial weight,” that judges give greater justification for imposing nonguideline sentences, and that appellate courts review nonguideline sentences under a stricter standard of review than currently exists. Proponents of these reforms appear to have forgotten that the Supreme Court essentially rejected

⁵⁹ One of the criticisms of the *Booker* decision is that racial disparities in sentencing are growing since it was decided. Last year, the U.S. Sentencing Commission released a report stating that black males and noncitizens received longer sentences after *Booker* than did white males and citizens, respectively, after controlling for many, but far from all, legally relevant differences among the groups. U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE *BOOKER REPORT’S* MULTIVARIATE REGRESSION ANALYSIS 2 (2010), available at http://www.ussc.gov/Research/Research_Publications/2010/20100311_Multivariate_Regression_Analysis_Report.pdf. There are numerous problems with this study, including contradictory research coming out of Pennsylvania State University. See Jeffery Ulmer, Michael T. Light & John Kramer, *The “Liberation” of Federal Judges’ Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence Between Courts?*, 28 JUST. Q. 799, 830 (2011) (“[G]ender and race differences in sentence length are slightly, but significantly, smaller post-*Booker* . . .”).

⁶⁰ See, e.g., Bill Otis, *Abolish the Sentencing Commission and Restore the Rule of Law*, CRIME & CONSEQUENCES (Feb. 11, 2011), <http://www.crimeandconsequences.com/crimblog/2011/02/abolish-the-sentencing-commiss.html>. See generally *Hearings*, *supra* note 55.

these proposals in *Gall* and *Rita* as unconstitutional.⁶¹ In order to have a truly advisory, and thus constitutional, guidelines system, such measures cannot be required. Since district judges are imposing Guidelines sentences an overwhelming majority of the time, we must question the wisdom of embarking on an enormous overhaul of federal sentencing to cure a “problem” that has yet to be identified. The Supreme Court’s jurisprudence since *Booker* and *Fanfan* has made it clear that the Guidelines have limitations. This is particularly true with respect to congressional directives given to the Sentencing Commission to increase the Guidelines with no empirical research or data that such increases will actually further the goals of sentencing. What proponents of strict Guidelines sentences may not realize is that sentencing judges are providing feedback to the Commission every time they vary from the Guidelines. Returning to a mandatory or near-mandatory guidelines scheme would cut off this feedback system and prevent judges from exercising reasonable discretion in cases that warrant it. Again, this occurs in only a small percentage of cases, but when it does, it actually helps the Sentencing Commission refine the Guidelines.

One of the limitations of our federal sentencing system is that it is code-based: each section of the criminal code corresponds to a particular guideline that sets forth the sentencing calculation. While this may be a good starting point, it fails to distinguish between individuals who are convicted under the same code section, but whose crime is vastly different. Each violation of the code section is treated the same, notwithstanding the circumstances surrounding the offense or the offender. Ostensibly, the guideline should make those distinctions, but it too often fails to do so meaningfully. This is because when the Guidelines were created, only two mitigating factors were included.⁶² One particularly egregious example of the code and the Guidelines’ failure to distinguish meaningfully between two offenses and offenders is in the context of a sex offense. If an 18-year-old high school junior is convicted of having sex with a 14-year-old high school sophomore under 18 U.S.C. § 2243(a), and a 21-year-old is convicted of

⁶¹ See *Gall v. United States*, 552 U.S. 38, 41 (2007) (“We now hold that . . . courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”); *Rita v. United States*, 551 U.S. 338, 355 (2007) (“Even the Government concedes that appellate courts may not presume that every variance from the advisory Guidelines is unreasonable.”).

⁶² See Thomas W. Hillier II & Amy Baron-Evans, *Six Years After Booker, the Evolution Has Just Begun*, 23 FED. SENT’G REP. 132, 136 n.15 (2010) (noting the reductions for “role in the offense” and “acceptance of responsibility”).

having sex with a 12-year-old under the same statute, then the sentence called for in the Guidelines under § 2A3.2 would be the same,⁶³ assuming both have the same criminal history score. Shouldn't the sentencing judge be allowed to take into account the age of the offender in fashioning an appropriate sentence in each case? Preventing the judge from considering the age of the defendant, as the Guidelines advise, would require the judge to treat these two very different cases exactly the same, resulting in unwarranted uniformity and possibly an unjust sentence. This example illustrates the absurdity of the notion that individuals convicted of the same code section violation deserve the same sentence.

In addition, the Guidelines, and in particular the sentencing table, create the illusion of precision. In other words, judges and parties often place too much emphasis on the calculation in hopes of arriving at a perfect range from which to extract a number of months that befit the offender. Focusing so much on the table creates a false certainty and can obscure the fact that we are meting out justice for individuals. The danger of placing undue emphasis on the mathematical calculation is underscored when one considers that the table itself was not based on any empirical research, nor was the failure to include more mitigating factors in the Guidelines.

The lack of mitigating factors in the Guidelines, and not rogue judges, is actually responsible for the rate of downward departures or variances that critics of the system highlight. Since mitigating factors are not part of the guideline analysis—but aggravating factors are—a judge has no choice but to depart or vary downward from the guideline range, based on the factors enumerated in 18 U.S.C. § 3553(a), to account for any existing mitigating factors he or she finds to be present. No other mechanism exists to account for these factors. This is a significant structural flaw in the guidelines system that is often lost on critics of judicial discretion. Taking the example of the 18-year-old offender above, a judge in that case would have to rely on the § 3553(a) factors, namely the history and characteristics of the defendant,⁶⁴ to consider the offender's age at sentencing, because the Guidelines, until recently, prohibited doing so.⁶⁵ This flexibility is precisely what the SRA

⁶³ U.S. SENTENCING GUIDELINES MANUAL § 2A3.2 (2011) (providing sentencing guidance for convictions of criminal sexual abuse of a minor under the age of sixteen years).

⁶⁴ See 18 U.S.C. § 3553(a)(1) (2006).

⁶⁵ While recently, § 5H1.1 of the Guidelines was amended to allow for consideration of an offender's age, it represents only a modest change—in light of the multitude of aggravating factors—and is not a part of the specific offense guideline.

sought to preserve: a regime where judges would sentence “outside the guidelines” when presented with a circumstance “not adequately considered in the formulation of the guidelines.”⁶⁶

Those interested in a truly robust debate about our federal sentencing system also should not discount the role that a federal prosecutor plays in sentencing. Critics presume that judges are to blame for what is in their view an unacceptable rate of sentences lower than that called for in the Guidelines. However, there exist several reasons—wholly independent of judges—for variations among districts in rates of nongovernment-sponsored below-range sentences, including: variations in composition of the case load; variations in the presence of cases, such as immigration cases, that have low guideline ranges where defendants may be sentenced to time served; and variations in the rate of government-sponsored downward departures, including the use of “fast track” departures, substantial assistance departures, other variances and departures, and Rule 35 motions after sentence is imposed. In addition, prosecutor-charging decisions, including overcharging or stacking of charges to ratchet up the Guidelines sentence, can greatly affect the rate of departures in a given district.

Despite this reality, there is virtually no discussion in Congress about this phenomenon, and legislation aimed at limiting prosecutorial discretion is a nonstarter. Even efforts to scale back mandatory minimum sentences, which have time and again been demonstrated to result in racial disparities and irrational sentences, are met with fierce opposition. This session, our energy has been focused on simply preventing the enactment of another mandatory minimum.⁶⁷

Furthermore, the attack on judicial discretion suggests that Congress and the Commission—who know nothing about the offense or the circumstances surrounding it—and prosecutors—who play an adversarial role in administering criminal justice—are in a better position to determine a fair sentence than the judges who hear all of the facts and circumstances from all sides. This defies common sense.

The changes made by *Booker* and its progeny are extremely modest and have been beneficial to the process. The alarm bell that some are

⁶⁶ S. REP. NO. 98-225, at 51-52 (1983).

⁶⁷ Last year’s passage of the Fair Sentencing Act, which eliminated the mandatory minimum for simple possession of crack cocaine, marked the first time in forty years that Congress repealed a mandatory minimum. See KARA GOTSCH, *THE SENTENCING PROJECT, BREAKTHROUGH IN U.S. DRUG SENTENCING REFORM: THE FAIR SENTENCING ACT AND THE UNFINISHED REFORM AGENDA* 6 (2011), available at http://sentencingproject.org/doc/dp_WOLA_Article.pdf.

sounding is a false alarm. Not only are changes to the current system unnecessary, but the consequences of moving to a more mandatory sentencing scheme can also be very detrimental. To appreciate the dangers of “the politics of sentencing,” one need only look to the unfair and racially discriminatory 100:1 sentencing disparity between powder cocaine and crack cocaine, which was enacted by Congress and took twenty years to remedy.⁶⁸ Indeed, there are some who think *Booker* did not go far enough. Yet the myopic focus on the alleged problems created by the *Booker* decision leave no room for a conversation about the true problems that persist with federal sentencing, such as mandatory minimums and a lack of evidence-based sentencing practices. This conversation is long overdue, but so long as we insist on deconstructing *Booker* year after year and blaming federal judges for their imagined sentencing activism, we will never get there.

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⁶⁸ Compare 21 U.S.C. § 841(b)(1)(A)(ii)(2006), with 21 U.S.C. § 841(b)(1)(A)(iii)(2006) amended by 21 U.S.C.A. § 841(b)(1)(A) (West Supp. 1A 2010); see also GOTSCH, *supra* note 67, at 6 (explaining that Congress set the new ratio at 18:1).