

CRIMINAL LAW — FEDERAL SENTENCING GUIDELINES — EIGHTH CIRCUIT HOLDS THAT DISTRICT COURT CANNOT REDUCE SENTENCE BASED ON CATEGORICAL DISAGREEMENT WITH 100:1 POWDER/CRACK COCAINE QUANTITY RATIO. — *United States v. Spears*, 469 F.3d 1166 (8th Cir. 2006) (en banc).

Though powder and crack cocaine are pharmacologically indistinguishable,¹ these two substances carry markedly different criminal penalties.² As the disproportionate racial impact of sentencing crack cocaine offenses much more harshly than those involving identical quantities of powder cocaine has become readily apparent,³ the United States Sentencing Commission — along with an increasing number of judges and politicians⁴ — has called for a reexamination of the 100:1 powder-to-crack quantity ratio in the Federal Sentencing Guidelines.⁵ Following the Supreme Court’s 2005 decision in *United States v. Booker*,⁶ critics of this sentencing disparity hoped that district courts

¹ See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at vi–vii (1995), available at <http://www.ussc.gov/crack/execsum.pdf> (“Powder cocaine and crack cocaine are two forms of the same drug, containing the same active ingredient Cocaine in any form . . . produces the same physiological and psychotropic effects.”); see also U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 19 (2002) [hereinafter 2002 COMM’N REPORT], available at http://www.ussc.gov/r_congress/o2crack/2002crackrpt.pdf (attributing any differences in addictiveness between powder and crack cocaine to “difference in typical methods of administration, not differences in the inherent properties of the two forms of the drugs”).

² See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2006). Under this ratio, a given quantity of crack cocaine is generally treated as equivalent to 100 times that same quantity of powder cocaine for the purpose of calculating a base offense level score under the Federal Sentencing Guidelines.

³ In fiscal year 2006, over eighty percent of federal crack cocaine offenders were African American. U.S. SENTENCING COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.34 (2006), available at <http://www.ussc.gov/ANNRPT/2006/table34.pdf>.

⁴ See *United States v. Castillo*, 460 F.3d 337, 350 (2d Cir. 2006) (describing the introduction of recent bills calling for a reduction or equalization of the disparity); Pamela A. MacLean, *After Booker, Judges Reduce Crack Cocaine Sentences*, LAW.COM, Oct. 11, 2005, <http://www.law.com/jsp/article.jsp?id=1128947761797> (discussing opposition to the current ratio among federal judges and members of Congress); see also CNN.com, *Inside Politics*, Transcript: George W. Bush Discusses the Challenges Facing His Presidency, Jan. 18, 2001, <http://transcripts.cnn.com/TRANSCRIPTS/010118/ip.01.html> (“[The disparity] ought to be addressed by making sure the powder-cocaine and the crack-cocaine penalties are the same.”).

⁵ See 2002 COMM’N REPORT, *supra* note 1, at v–viii (enumerating the problems generated by the disparity and recommending a less drastic ratio).

⁶ 125 S. Ct. 738 (2005). *Booker*’s merits opinion held that the mandatory application of the Guidelines was unconstitutional because it required judges to enhance defendants’ sentences based on facts not found by a jury. See *id.* at 756 (Stevens, J., delivering the opinion of the Court in part). *Booker*’s remedial opinion held that this constitutional defect could be cured by striking the statutory provisions that made the application of the Guidelines mandatory. See *id.* at 756–57 (Breyer, J., delivering the opinion of the Court in part). The remedial opinion also articulated an appellate standard of review of “reasonableness” for the sentences imposed by district courts. *Id.* at 765–66.

would have increased freedom to reexamine the ratio,⁷ but subsequent appellate decisions have curtailed this possibility.⁸ Recently, in *United States v. Spears*,⁹ the Eighth Circuit ruled that it was impermissible for a district judge to grant a reduced sentence to a crack offender based on categorical disagreement with the ratio.¹⁰ This decision relied on questionable conclusions about Congress's intent regarding both the 100:1 ratio and the place of judicial policy choices in a post-*Booker* world, and its result cabins judges into a cramped and counterproductive role in the sentencing of crack offenders.

In June 2004, Steven Spears was arrested for distributing drugs in an Iowa motel room.¹¹ He was convicted by a federal jury of conspiracy to distribute almost two kilograms of crack cocaine and 500 grams of powder cocaine.¹² Under the U.S. Sentencing Guidelines, these quantities, combined with Spears's criminal history, generated a sentencing range of 324 to 405 months in prison.¹³ At Spears's sentencing hearing, District Judge Bennett¹⁴ categorically rejected the 100:1 Guidelines ratio and opted instead to employ a 20:1 ratio, sentencing Spears to the statutory minimum of 240 months' imprisonment.¹⁵ Both Spears and the government appealed.

The Eighth Circuit upheld Spears's conviction but reversed his sentence as unreasonable. Writing for an en banc court,¹⁶ Judge Ri-

⁷ See RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER *BOOKER* 1–2, 20 (2006), available at <http://www.sentencingproject.org/pdfs/crackcocaine-afterbooker.pdf> (describing “the emergence of a new methodology of judicial deliberation” that could lead to a reconsideration of crack sentences post-*Booker*).

⁸ See cases cited *infra* note 19.

⁹ 469 F.3d 1166 (8th Cir. 2006) (en banc).

¹⁰ *Id.* at 1178.

¹¹ *Id.* at 1168.

¹² *Id.* at 1169.

¹³ *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2006).

¹⁴ Judge Bennett has been a vocal proponent of increased sentencing discretion for district judges post-*Booker*. See *United States v. Saenz*, 429 F. Supp. 2d 1081, 1083 (N.D. Iowa 2006) (Bennett, J.) (taking issue with the Eighth Circuit's frequent reversals of below-Guidelines departures for defendants who afforded the government “substantial assistance”); see also Bert Dalmer, *Prosecutor, Judge Trade Fire over Sentencing*, DES MOINES REG., Dec. 1, 2004, at 1A, LEXIS, News Library, Desreg File (describing Judge Bennett's threat to hold in contempt a prosecutor who repeatedly challenged his sentencing discretion).

¹⁵ *Spears*, 469 F.3d at 1169. Judge Bennett relied on Judge Smith's sentencing memorandum findings in *United States v. Perry*, 389 F. Supp. 2d 278 (D.R.I. 2005). Judge Smith had reasoned that the Supreme Court's decision in *Booker* compelled him to revisit the ratio. He found that the 100:1 powder/crack disparity was unjustified under the sentencing policies articulated in 18 U.S.C. § 3553(a), and chose to adopt a ratio of 20:1 — the ratio recommended by the Sentencing Commission in its most recent study of the matter. *Perry*, 389 F. Supp. 2d at 307 & n.32, *abrogated by* *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006).

¹⁶ The Eighth Circuit decided to hear the case en banc on its own motion, without a ruling from the panel or additional briefing. For speculation on the reasons behind this “procedural quirkiness,” see The (Hinky?) Procedural Back-Story on *Spears*, Sentencing Law and Policy,

ley¹⁷ noted that although *Booker* seemed to open the door for challenges to the ratio by expanding the judicial role in federal sentencing,¹⁸ no other circuit had allowed a district court to reject categorically the 100:1 ratio.¹⁹ Judge Riley held that the district court failed to perform a case-specific analysis of the sentencing policies reflected in 18 U.S.C. § 3553(a).²⁰ The majority also faulted the district court for exceeding its discretion by engaging in a policy judgment of the sort that only Congress should make.²¹ Judge Riley found that the 100:1 ratio represented Congress's policy choice: the ratio was "one that Congress has continually refused to alter,"²² and "[t]he reason for this inaction, whether due to a political stalemate or other legislative grounds, is irrelevant."²³ The court concluded by further emphasizing the institutional considerations that disallow judges from second-guessing Congress's preservation of the disparity: "Our court, as an unelected body, cannot impose its sentencing policy views and dismiss the views of the peoples' elected representatives. The judiciary must defer to Congress on sentencing policy issues."²⁴

Judge Bye concurred in affirming Spears's conviction but dissented with respect to the powder/crack disparity.²⁵ He conceded that the 100:1 ratio maintains some gravitational force in post-*Booker* sentencing because district courts must employ the ratio to calculate the advisory Guidelines sentence and then give some weight to this range in imposing a particular sentence.²⁶ But he argued that since *Booker* made the Guidelines advisory, a district court could "declin[e] to follow Congressional advice" if it had a reasoned basis for doing so.²⁷

http://sentencing.typepad.com/sentencing_law_and_policy/2006/12/the_hinky_proce.html (Dec. 6, 2006, 7:41 EST).

¹⁷ Judge Riley was joined by Chief Judge Loken and Judges Wollman, Murphy, Melloy, Smith, Colloton, Gruender, Benton, and Shepherd.

¹⁸ See *Spears*, 469 F.3d at 1173.

¹⁹ *Id.* at 1174–75 (citing *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States v. Joiner*, 457 F.3d 682, 687–88 (7th Cir. 2006); *United States v. Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006); *Pho*, 433 F.3d at 54 (1st Cir. 2006)). The *Spears* court also cited *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006), which held that although the district court erred by imposing a sentence under the belief that it had no discretion to depart from the 100:1 Guidelines ratio, categorical departures are "*verboten*." *Id.* at 248–49. Since *Spears* was decided, the D.C. Circuit reached a result similar to that of *Gunter*, holding that judges must have the discretion to depart based on case-specific circumstances but declining to rule on the issue of policy disagreement. *United States v. Pickett*, No. 05-3179, 2007 WL 445937, at *7 (D.C. Cir. Feb. 13, 2007).

²⁰ *Spears*, 469 F.3d at 1176–77.

²¹ *Id.* at 1177–78.

²² *Id.* at 1177 (quoting *Castillo*, 460 F.3d at 357).

²³ *Id.* at 1178.

²⁴ *Id.*

²⁵ Judge Bye was joined by Judge Lay.

²⁶ *Spears*, 469 F.3d at 1179 (Bye, J., concurring in part and dissenting in part).

²⁷ *Id.*

By resting its holding on a distinction between appropriate individualized consideration and impermissible judicial policymaking, the *Spears* court joined other circuits in their reasoning as well as their results. These courts have avoided questioning the 100:1 ratio by asserting that the disparity embodies a congressional policy determination that sentencing judges are in no position to challenge.²⁸ Yet the current ratio is far from a clear expression of the will of Congress (or the Commission, for that matter), and the judicial policy choices the *Spears* court condemned fall well within a plausible interpretation of a district court's post-*Booker* statutory mandate. In addition, a more active judicial role in the crack sentencing context would likely lead to fairer outcomes than consigning this issue to the inertias and biases of the political process.

In concluding that the district court had engaged in impermissible judicial policymaking, the Eighth Circuit relied on the questionable premise that the 100:1 ratio contained in the Guidelines reflects Congress's intent. In fact, Congress's stance on the Guidelines ratio is less than pellucid. The Anti-Drug Abuse Act of 1986²⁹ introduced a 100:1 ratio for the purpose of triggering mandatory minimum sentences³⁰ — that is to say, five grams of crack cocaine would prompt the same minimum sentence as 500 grams of cocaine powder. The Sentencing Commission, not Congress, chose to apply the 100:1 ratio in calculating every federal cocaine offender's Guidelines sentence.³¹ In 1994, Congress indicated doubts about the disparity by passing a "safety valve" provision exempting some defendants from mandatory minimums³² and solicited a report from the Sentencing Commission on the treatment of cocaine under the Guidelines.³³ Although Congress rejected the Commission's recommendation to eliminate the disparity entirely, it also called for the Commission to propose new recommendations for bringing the ratio closer to parity.³⁴ To be sure, Congress did

²⁸ See cases cited *supra* note 19.

²⁹ Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended primarily in scattered sections of 18, 21, and 31 U.S.C.).

³⁰ *Id.* tit. I, § 1002, 100 Stat. at 3207-2 (codified as amended at 18 U.S.C. § 841 (2000)); see also David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1293-97 (1995) (documenting the atmosphere of racialized fears that permeated Congress's hasty consideration of the ratio).

³¹ See *United States v. Pho*, 433 F.3d 53, 55 (1st Cir. 2006).

³² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. VIII, 108 Stat. 1796, 1985-86 (codified as amended at 18 U.S.C. § 3553(f) (2000 & Supp. IV 2004)).

³³ *Id.* tit. XVIII, 108 Stat. at 2097.

³⁴ Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334. Congress may have been loath to reduce the 100:1 ratio without implementing a corresponding ratio change for mandatory minimum purposes. See *United States v. Castillo*, 460 F.3d 337, 358-59 (2d Cir. 2006) (citing H.R. REP. NO. 104-272, at 3-5 (1995), reprinted in 1995 U.S.C.A.N. 335, 336-38 (noting that doing so would create "gross sentencing disparities")); see also *Pho*, 433 F.3d at 63-64 (describing sentenc-

not act on two subsequent Commission reports that recommended reducing the disparity,³⁵ but it also never affirmatively endorsed the 100:1 Guidelines ratio as appropriate. Even if Congress's responses to the Commission's proposals support preserving some disparity between crack and powder cocaine sentences, a district judge's application of a 20:1 ratio is consistent with Congress's expressed intent.

Moreover, the categorical judicial reasoning rejected by the *Spears* court actually reflects a principled interpretation of the statutory provisions delimiting a district judge's sentencing role. After *Booker*, sentencing judges must consult the sentencing principles collected in 18 U.S.C. § 3553(a) to assess whether a variance from the advisory Guidelines sentence should be granted.³⁶ On their face, some of these factors can be read to call for determinations that go beyond the circumstances of the case: the parsimony provision of § 3553(a) plainly states that sentences must be "sufficient, but not greater than necessary" to promote the enumerated sentencing purposes and to "avoid unwarranted sentence disparities among defendants . . . who have been found guilty of similar conduct."³⁷ In light of the well-founded criticism of the 100:1 ratio, Judge Bennett's choice to adopt the Commission's recommended 20:1 ratio would seem to be consistent with the text of these provisions. Yet the *Spears* court failed to engage with the question of whether § 3553(a) factors enable judges to look beyond the peculiarities of one particular defendant and crime.³⁸

ing differentials that could arise from the simultaneous existence of a statutory 100:1 mandatory minimum quantity ratio and a 20:1 Guidelines quantity ratio). Even given this concern, Congress's decision to reject complete equalization of powder and crack cocaine quantities for sentencing purposes does not necessarily evince approval of the 100:1 ratio. See H.R. REP. NO. 104-272, at 4, reprinted in 1995 U.S.C.C.A.N. at 337 (noting that 100:1 "may not be the appropriate ratio" and calling for the Commission to study a potential revision); see also *United States v. Pickett*, No. 05-3719, 2007 WL 445937, at *7 (D.C. Cir. Feb. 13, 2007) ("True enough, the mandatory minimums reflect a congressional policy choice that crack cocaine offenses should be punished more severely than powder cocaine offenses involving the same weight of drugs. But this entirely evades the question. How much more severely? That point . . . is the critical consideration about which Congress has had nothing to say, except what the minimum and maximum punishment will be.").

³⁵ See 2002 COMM'N REPORT, *supra* note 1; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997), available at http://www.ussc.gov/r_congress/newcrack.pdf.

³⁶ E.g., *Spears*, 369 F.3d at 1177.

³⁷ 18 U.S.C. § 3553(a), (a)(6) (2000 & Supp. IV 2004); see also Crack Sentencing and the Anti-Parsimony Pandemic, Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/crack_sentencin.html (June 24, 2006, 9:38 EST). Some of these enumerated sentencing purposes seem to invite something more than case-specific determinations, for example, the need to "reflect the seriousness of the offense," "promote respect for the law," and "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(A), (B).

³⁸ See *Spears*, 369 F.3d at 1176-78. The *Spears* majority did not directly address the dissent's argument that § 3553(a)(2)(A), which calls for the sentence to "reflect the seriousness of the offense," must go beyond § 3553(a)(1)'s case-specific concern with the "nature and circumstance of

Other circuits have countered such interpretations of § 3553(a)'s text by referring back to the legislative intent behind the section's provisions.³⁹ To be sure, Congress's intent regarding the scope of judicial sentencing policy determinations may be clearer than its intent with respect to the 100:1 ratio, but it is ultimately beside the point in light of *Booker*'s remedial opinion.⁴⁰ Although Justice Breyer's severability analysis centered on what Congress would have intended had it known sentencing under mandatory Guidelines would violate the Sixth Amendment, the very nature of this hypothetical inquiry implies that § 3553(a) must now mean something apart from what Congress wanted when the Sentencing Reform Act of 1984⁴¹ was passed.⁴² Thus, regardless of whether Congress intended the § 3553(a) factors to preclude judicial determinations that go beyond case-specific circumstances, judges must now have some measure of increased discretion to interpret and apply these factors in order for the *Booker* remedy to have any effect in curing the constitutional violation.⁴³

Given the indeterminacy of legislative intent in this context, the question of whether to adopt a "maximalist" or "minimalist"⁴⁴ approach to post-*Booker* crack sentencing discretion should turn at least in part on policy considerations. Though the need for judicial deference to Congress's role in developing sentencing policy is firmly estab-

the offense" in order to avoid rendering the latter section redundant. *See Spears*, 369 F.3d at 1181 (Lay, J., concurring in part and dissenting in part); *see also* Brief for the ACLU Found. Drug Law Reform Project et al. as Amici Curiae in Support of Appellant/Cross-Appellee Spears and in Favor of Affirmance at 4–9, *Spears*, 469 F.3d 1166 (Nos. 05-4468, 06-1354), *available at* http://www.aclu.org/images/asset_upload_file688_25731.pdf (containing various textual arguments that § 3553(a) factors require determinations that go beyond the specific case). *But cf. Castillo*, 460 F.3d at 355–56 (reading § 3553(a)(2) in conjunction with (a)(4), which refers to the "applicable category of defendant as set forth in the guidelines," to draw a distinction between individualized judgments to be made by district courts and categorical determinations to be made by the Commission).

³⁹ *See, e.g., Castillo*, 460 F.3d at 357; *Pho*, 433 F.3d at 62.

⁴⁰ *See supra* note 6.

⁴¹ Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

⁴² Indeed, the remedial opinion noted that "some provisions [of the Sentencing Reform Act] will apply differently from the way Congress had originally expected" and acknowledged that advisory Guidelines would yield less uniformity than Congress had initially intended. *United States v. Booker*, 125 S. Ct. 738, 767 (2005) (Breyer, J., delivering the opinion of the Court in part).

⁴³ Even if a particular sentence does not implicate *Booker*'s constitutional concern with improper judicial fact-finding, district judges commit nonconstitutional error when they violate *Booker*'s remedial opinion by treating the Guidelines as mandatory. *See* Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 669 (2006); *see also* Transcript of Oral Argument at 27, *Rita v. United States*, No. 06-5754 (U.S. argued Feb. 20, 2007) (argument of Deputy Solicitor General Dreeben), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-5754.pdf ("I think that the reconciliation of this Court's merits opinion in *Booker* and its remedial opinion in *Booker* does dictate that the judge has additional freedom to impose a sentence that's different from what's described in the Guidelines.").

⁴⁴ *See* McConnell, *supra* note 43, at 666.

lished in the case law,⁴⁵ the normative foundations for such solicitude are shaky with respect to federal sentencing generally and the powder/crack disparity in particular. As a preliminary matter, it is not clear that the baseline of separation of powers in the sentencing context should have the Sentencing Commission encroaching on the power to check criminal laws that judges and juries had traditionally retained.⁴⁶ Moreover, although *Spears* invoked the superior majoritarian status of Congress,⁴⁷ polling data suggests that the current disparity falls far short of representing popular preferences.⁴⁸ There are additional reasons to believe the political process is prone to failure in the crack sentencing context. As several unsuccessful equal protection challenges to the ratio have alleged,⁴⁹ crack offenders are a paradigmatic case of a “discrete and insular” minority⁵⁰ whose interests are unlikely to be protected by the political process.⁵¹ As such, crack defendants are ill-equipped to counteract the structural biases within the political economy of federal sentencing⁵² that give lawmakers incentives to impose unduly harsh penalties.

Finally, the *Spears* majority declined to rule on an issue that may threaten the distinction between policymaking and case-specific judging: whether a judge can rely on disagreement with the 100:1 ratio in conjunction with other factors particular to an individual case to justify a below-Guidelines sentence. Even if the 100:1 ratio were substantively wise and reflective of congressional intent, precluding judges from challenging it on policy grounds would likely be impracticable and counterproductive. District judges sentencing crack offenders

⁴⁵ See, e.g., *United States v. Evans*, 333 U.S. 483, 486 (1948) (“In our system . . . defining crimes and fixing penalties are legislative, not judicial, functions.”).

⁴⁶ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1042–44 (2006).

⁴⁷ See *Spears*, 469 F.3d at 1178.

⁴⁸ See U.S. SENTENCING COMM’N, PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 86 (1995), available at http://www.ussc.gov/nss/jp_ch6.pdf (“[P]erhaps the most important finding [of polling on drug trafficking sentences] is that the general public does not make important distinctions between trafficking in heroin, powder cocaine, and crack cocaine . . .”).

⁴⁹ See, e.g., *United States v. Clary*, 846 F. Supp. 768, 793–94 (E.D. Mo.), *rev’d*, 34 F.3d 709 (8th Cir. 1994); *Stewart v. United States*, 817 F. Supp. 12, 13 n.3 (S.D.N.Y. 1993).

⁵⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵¹ See Sklansky, *supra* note 30, at 1299–1302; cf. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 784–85 (2006) (arguing that the constitutionalization of criminal procedure has led to pathologies that impede representation reinforcement). *But cf.* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1266–69 (1994) (suggesting that heavier punishments for crack cocaine may be justified because of their benefits for law-abiding African Americans).

⁵² See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1280–83 (2005); Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1720–23 (2006); Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 107–110 (1999); Stuntz, *supra* note 51, at 805–07.

post-*Booker* may find themselves caught between the Scylla of expressing policy disagreement with the Guidelines and the Charybdis of failing to recognize their discretion to depart from the Guidelines ratio, both of which may be reversible error.⁵³ A district judge skeptical of the Guidelines ratio could consistently grant downward variances for crack offenders as long as she did not acknowledge her operative revised ratio, but a searching form of appellate review designed to combat such circumventions might poison the comity between district and circuit court judges.⁵⁴ Squelching judicial candor in this way is unlikely to achieve the goal of ensuring uniformity or the development of thoughtful sentencing policies.⁵⁵ On the other hand, encouraging district courts to offer sincere expressions of “reasoned judgment”⁵⁶ might result in fairer sentencing outcomes, encourage public dialogue about the powder/crack disparity, and perhaps even lead to legislative change.

⁵³ See, e.g., *United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006).

⁵⁴ The Eleventh Circuit has sought to flush out instances when judges purport to grant case-specific variances “couch[ed] . . . in the language of the § 3553(a) factors” but actually categorically disagreed with the Guidelines ratio. *United States v. Williams*, No. 05-13205, 2006 WL 3615300, at *3 (11th Cir. Dec. 13, 2006) (Black, J., concurring in the denial of rehearing en banc). Although he acknowledged that a “gray area” exists between “case-specific, individualized facts and generalized rejections of unambiguous congressional policy,” Judge Black expressed confidence that he could differentiate between these two categories. *Id.* Upon remand, District Judge Presnell took umbrage with what he perceived as the Eleventh Circuit’s suggestion that he “lacked the courage or the honesty to admit why [he] was not adhering to the guidelines,” *United States v. Williams*, No. 6:04-cr-111-GAP-JGG, slip op. at 3 (M.D. Fla. Mar. 1, 2007), and starkly illuminated the nearly intractable position of a district judge post-*Booker*:

So what am I to do? I am instructed to resentence Mr. Williams using only individualized consideration of the statutory factors. Am I to (somehow) ignore the widely held belief that the crack-powder disparity is inherently unjust; or may I subconsciously consider it in relationship to the offense conduct so long as it does not overwhelm my subjective judgment? . . . Should I . . . subvert my own sense of justice in order to purify my consideration of the statutory factors? Is that even humanly possible?

Id. at 6.

⁵⁵ See Carissa Byrne Hessick & F. Andrew Hessick, Rita, Claiborne, and the Courts of Appeals’ Attachment to the Sentencing Guidelines, 19 FED. SENT’G REP. (forthcoming 2007) (manuscript at 1, on file with the Harvard Law School Library) (“[I]n an effort to avoid the appearance of judicial policy making, . . . some appellate courts now act essentially as super-district courts, devoting efforts to second-guessing the factual findings and sentencing judgments of district courts rather than developing principles that could be applied in future cases.”).

⁵⁶ Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 413–14 (2006) (reconciling *Booker* opinions as calling for an expanded judicial role in sentencing).