

ARTICLE

TWEAKING *BOOKER*: ADVISORY GUIDELINES IN THE FEDERAL SYSTEM

*Douglas A. Berman**

TABLE OF CONTENTS

I. INTRODUCTION342

II. ASSESSING THE HAND THAT *BOOKER* DEALT343

 A. *Booker’s Origins and Holding*343

 B. *Booker’s Impact, Virtues, and Vices*347

III. PROPOSED RESHUFFLES AND THEIR PROBLEMS.....356

 A. *Proposals for “Topless Guidelines”*356

 1. *The “Topless” Essentials*356

 2. *The “Topless” Problems*359

 B. *Proposals for “Blakely-ized Guidelines”*365

 1. *The “Blakely-ized” Essentials*365

 2. *The “Blakely-ized” Problems*366

 C. *Political Realities and the Need for Stability*371

IV. PLAYING THE *BOOKER* HAND: THE WHO AND HOW OF
EFFECTIVE TWEAKING376

 A. *Who Should Tweak Booker*.....377

 B. *How to Tweak Booker*381

 1. *Emphasis on Repeat and Violent Offenders*382

 2. *Role for Offender Circumstances*383

 3. *Balanced Pursuit of Uniformity*385

 4. *The Key Link Between Procedure and
Substance*386

* William B. Saxbe Designated Professor of Law, Michael E. Moritz College of Law at The Ohio State University.

V. CONCLUSION.....388

“Ours, of course, is not the last word: The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.”

Justice Breyer, writing for the Court¹

I. INTRODUCTION

The origins and rationale of the Supreme Court’s decision in *United States v. Booker*² are fascinating topics worthy of extended examination and analysis.³ But, for federal policymakers and practitioners (not to mention federal defendants), the most pressing concern is the impact of *Booker* on the current realities and future direction of the federal sentencing system. Justice Breyer stressed in the remedial portion of the *Booker* opinion that Congress could choose to redesign the federal sentencing system in the wake of *Booker*. But the old proverb which says “if it ain’t broke, don’t fix it” may provide the best counsel now that the federal sentencing ball lies in Congress’s court.

If writing on a blank slate, few would likely advocate the precise sentencing system resulting from the Supreme Court’s decision in *Booker*. Nevertheless, in this Article, I contend that policymakers should consider playing the peculiar *Booker* hand that the Court has dealt for federal sentencing. Especially because any significant alteration of the structure of federal sentencing remains legally treacherous and fraught with uncertainty, Congress and the U.S. Sentencing Commission (“Commission”) should focus their efforts and energies on improving the advisory guideline system that *Booker* has produced. I suggest that, though the sentencing scheme created by *Booker* is far from perfect, a program of modulated incremental changes is likely to provide the soundest course for the post-*Booker* development of the federal sentencing system.

1. *United States v. Booker*, 125 S. Ct. 738, 768 (2005).

2. *Id.*

3. I have conducted an extended examination and analysis of the origins and rationale of *United States v. Booker* in other recent articles. See Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653 (2005) [hereinafter Berman, *Pondering Process*]; Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. (forthcoming 2006) [hereinafter Berman, *Conceptualizing Booker*]; Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1 [hereinafter Berman, *Reconceptualizing Sentencing*].

Part II of this Article provides background on the Supreme Court's decision in *Booker* and assesses the state of federal sentencing a year after *Booker* transformed the Federal Sentencing Guidelines ("Guidelines") from mandates to advice. This review of *Booker*'s impact reveals that *Booker* has not changed federal sentencing all that much, and that the few changes *Booker* has brought have been mostly for the better.

Part III turns to an exploration of leading "*Booker* fix" proposals. This Part highlights that the major proposed responses to *Booker* necessarily present legal, policy, and practical problems. Moreover, as this Part explains, after a recent period of extraordinary legal turmoil and uncertainty, federal policymakers would be wise to pursue a course of sentencing reform that might minimize instability in the federal system. This Part thus contends that small changes to the current advisory guideline system—"Booker tweaks"—are to be preferred to any major *Booker* fix.

Part IV details why the sentencing system created by *Booker* needs to be and should be tweaked. Though perhaps preferable to leading alternatives, the sentencing system *Booker* produced is hardly perfect; some modifications are essential for advisory guidelines to work effectively in the federal system for an extended period. This Part concludes by outlining key players and considerations for tweaking *Booker*.

II. ASSESSING THE HAND THAT *BOOKER* DEALT

A. *Booker's Origins and Holding*

The *Booker* ruling materialized from a contentious and convoluted Sixth Amendment jurisprudence the Supreme Court has developed over the last decade.⁴ Prior to the emergence of this new jurisprudence, the Supreme Court, through a series of rulings over half a century, had repeatedly held that sentencing was to be treated differently—and could be far less procedurally regulated—than a traditional criminal trial.⁵ But in a remarkable

4. See Berman, *Reconceptualizing Sentencing*, *supra* note 3, at 24–41 (detailing and lamenting conceptual problems in the line of decisions culminating with *Booker*); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1088–1101 (2005) (noting gaps and holes in the Supreme Court's recent Sixth Amendment decisions and describing this jurisprudence as "a kind of constitutional 'Swiss cheese'").

5. See, e.g., *United States v. Watts*, 519 U.S. 148, 156–57 (1997) (allowing courts to use lower standards of proof at the sentencing stage of a trial); *McMillan v. Pennsylvania*, 477 U.S. 79, 83–85 (1986) (permitting mandatory sentence enhancements based on facts

fin-de-siècle development, the Supreme Court started to express “constitutional doubts” about judicial fact-finding and traditionally lax sentencing procedures;⁶ in 2000, the Court’s new constitutional perspective formally shook the world of sentencing with the “watershed” ruling in *Apprendi v. New Jersey*.⁷

The Supreme Court in *Apprendi* found constitutionally problematic a New Jersey hate crime statute that authorized judges to impose higher sentences based on findings by a preponderance of the evidence.⁸ The *Apprendi* decision, which declared that “[o]ther 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,”⁹ suggested that defendants must be afforded greater procedural rights in modern structured sentencing systems. The constitutional principles announced in *Apprendi* were ultimately applied in *Blakely v. Washington* to invalidate judicial fact-finding that permitted enhanced sentences within guideline systems.¹⁰ The *Blakely* ruling, in turn, set the stage for *Booker*’s disruption of federal sentencing law and practices that had been in operation—and thought to be constitutionally sound—for more than fifteen years.¹¹

not proven to a jury); *Williams v. New York*, 337 U.S. 241, 250–52 (1949); see also Berman, *Reconceptualizing Sentencing*, *supra* note 3, at 15–24 (“[T]he Supreme Court repeatedly reaffirmed its decision in *Williams* and repeatedly ruled that criminal sentencings were to be subject to far less procedural regulation than criminal trials.”).

6. See *Jones v. United States*, 526 U.S. 227 (1999); see also *Almendarez-Torres v. United States*, 523 U.S. 224, 248–71 (1998) (Scalia, J., dissenting) (“That it is genuinely doubtful whether the Constitution permits a judge . . . to determine by a mere preponderance of the evidence . . . a fact that increases the maximum penalty . . . is clear enough from [the Court’s] prior cases . . .”).

7. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Justice Sandra Day O’Connor, writing in dissent in *Apprendi v. New Jersey*, used the term “watershed” to describe the majority’s decision. See *id.* at 524 (O’Connor, J., dissenting) (asserting that the *Apprendi* decision “will surely be remembered as a watershed change in constitutional law”).

8. *Id.* at 468–69 (majority opinion).

9. *Id.* at 490.

10. *Blakely v. Washington*, 124 S. Ct. 2531, 2536–38 (2004). For a fuller account of the jurisprudential path from *Apprendi* to *Blakely* to *Booker*, see Berman, *Reconceptualizing Sentencing*, *supra* note 3, at 24–41.

11. A series of constitutional challenges were lodged against the Federal Sentencing Guidelines (“Guidelines”) after they were first promulgated and took effect in November 1987. But the Supreme Court seemed to have approved the Guidelines’ basic constitutionality when, in *Mistretta v. United States*, the Court rejected a set of structural challenges to the statute that authorized the Guidelines, the Sentencing Reform Act of 1984. *Mistretta v. United States*, 488 U.S. 361, 412 (1989). Moreover, in a number of subsequent decisions in the years before *Booker*, the Supreme Court had consistently rejected a range of claims that the Guidelines’ sentencing mandates operated in an unconstitutional manner. See, e.g., *United States v. Watts*, 519 U.S. 148 (1997); *Witte v. United States*, 515 U.S. 389 (1995); *United States v. Dunnigan*, 507 U.S. 87 (1993).

The Supreme Court's decision in *Booker*—which runs 118 pages with two majority opinions from two distinct coalitions of Justices—is challenging to comprehend, let alone summarize. The decision's essence can be distilled through this opening passage of Justice Stevens's opinion for the Court:

We hold that [the lower] courts correctly concluded that the Sixth Amendment as construed in *Blakely* does apply to the [Federal] Sentencing Guidelines. In a separate opinion authored by Justice BREYER, the Court concludes that in light of this holding, two provisions of the Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent.¹²

In other words, one group of five Justices, led by Justice Stevens, declared in *Booker* that the Guidelines, when mandating judicial fact-finding for determining applicable sentencing ranges, transgressed the Sixth Amendment's jury trial right.¹³ But the prescribed remedy was not, as this ruling would seem to connote, a larger role for juries in the operation of the federal sentencing system. Rather, as a result of a defection by Justice Ruth Bader Ginsburg, a different group of five Justices, led by Justice Breyer, concluded that the remedy for this Sixth Amendment problem was to declare the Guidelines "effectively advisory."¹⁴

As I have discussed more fully in other recent articles, the remarkable *Booker* decision found a way to further obscure the Supreme Court's conceptually muddled sentencing jurisprudence.¹⁵ Through the amalgam of dual rulings from dueling majorities, the Court declared in *Booker* that the federal sentencing system could no longer rely upon mandated and tightly directed judicial fact-finding. But, as a remedy, the Court produced a system which now relies upon discretionary and loosely directed judicial fact-finding. Thus, to culminate a jurisprudence seemingly seeking to vindicate the role of the *jury* in modern sentencing systems, *Booker* devised a remedy which ultimately gave federal *judges* new and expanded sentencing powers.

12. United States v. Booker, 125 S. Ct. 738, 746 (2005).

13. See *id.* at 756. Joining in the opinion by Justice Stevens were Justices Scalia, Souter, Thomas, and Ginsburg. *Id.* at 746 n.***.

14. See *id.* at 756–57. Joining in the opinion by Justice Breyer were Chief Justice Rehnquist and Justices O'Connor, Kennedy and Ginsburg. *Id.* at 756 n.*.

15. See generally Berman, *Pondering Process*, *supra* note 3; Berman, *Reconceptualizing Sentencing*, *supra* note 3.

Though *Booker's* conceptual principles may be opaque,¹⁶ Justice Breyer's goals in the remedial portion of the opinion seem quite clear. Influenced perhaps by his central role in the development of a federal guideline system that has always depended heavily upon judicial fact-finding,¹⁷ Justice Breyer has been an adamant opponent of the Sixth Amendment jurisprudence that led the Supreme Court in *Apprendi* and *Blakely* to declare unconstitutional certain types of judicial fact-finding at sentencing.¹⁸ In *Booker*, Justice Breyer failed to convince his colleagues to uphold a mandatory federal guidelines system that depends on judicial fact-finding. But, by swaying Justice Ginsburg to serve as a key fifth vote for his remedial opinion, Justice Breyer was able to engineer an advisory federal guideline system that depends on judicial fact-finding. And Justice Breyer's remedial opinion in *Booker* clearly sought to preserve, to the extent possible in light of the Court's constitutional holding, the fundamental pre-*Booker* features of the federal sentencing system.

In *Booker's* remedial opinion, Justice Breyer, after "excising" those sections of the Sentencing Reform Act that made the Guidelines mandatory, extols the value, role, and continued importance of the Guidelines. Justice Breyer's opinion stresses that, even as an advisory system, the Sentencing Reform Act still "requires judges to take account of the Guidelines" and "requires

16. Many commentators have noted the apparent conceptual confusions in the *Booker* opinions. See, e.g., Reitz, *supra* note 4, at 1096 ("To many, the two lead opinions in *Booker* have seemed incomprehensible when read side by side."); see also Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 714-15 (2005) (discussing the lack of cohesion in the *Booker* opinions). In a recent article, I have suggested that,

[*Booker*] is best understood not in term[s] of vindicating the role of juries and the meaning of the Sixth Amendment's jury trial right, but rather in terms of vindicating the role of judges and the meaning of sentencing as a distinct criminal justice enterprise defined and defensible in terms of the exercise of reasoned judgment.

Berman, *Conceptualizing Booker*, *supra* note 3 (manuscript at 2).

17. In the 1970s, Justice Breyer played a role in Congress's development of the Sentencing Reform Act as a lawyer for the Senate Judiciary Committee, and in the 1980s he played a central role in the U.S. Sentencing Commission's ("Commission") development of the Guidelines as a member of the original Commission. See Tony Mauro, *Breyer Sought Advice on Whether to Recuse in Sentencing Case*, LEGAL TIMES, Jan. 18, 2005; see also Emily Bazelon, *Locked In*, BOSTON GLOBE, Aug. 1, 2004, at D1 (discussing Justice Breyer's work as a member of the original Commission).

18. See *Blakely v. Washington*, 124 S. Ct. 2531, 2551 (2004) (Breyer, J., dissenting); *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting); see also *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998) (upholding constitutionality of certain types of judicial fact-finding at sentencing).

judges to consider the Guidelines ‘sentencing range.’”¹⁹ Toward the conclusion of his opinion, Justice Breyer suggests that the Guidelines remain central to achieving Congress’s sentencing reform goals, and he reiterates for the Court that “district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”²⁰ Federal judges often must, of course, engage in judicial fact-finding in order to determine the Guidelines range that, after *Booker*, they are still expected to “consider.”

In addition to preserving a central role for the Guidelines and judicial fact-finding at sentencing, Justice Breyer’s remedial opinion also preserves other essential features of the pre-*Booker* sentencing system. The remedial opinion in *Booker* declares that circuit courts should continue to hear sentencing appeals as provided by the Sentencing Reform Act, although the task of appellate review gets recast into “determining whether a sentence is unreasonable.”²¹ And, Justice Breyer’s remedial opinion describes the role of the Commission in an advisory guidelines system as essentially unchanged: “[T]he Sentencing Commission,” explains Justice Breyer, “remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”²²

B. *Booker’s Impact, Virtues, and Vices*

Because judicial complaints about the rigidity, complexity, and harshness of the Guidelines were legion before *Booker*,²³ one

19. *Booker*, 125 S. Ct. at 764.

20. *Id.* at 767.

21. *Id.* at 765–66. As discussed in Professor Nancy King’s contribution to this Symposium, reasonableness review in the circuit courts looks a lot like pre-*Booker* appellate review of guideline sentences. Nancy King, *Reasonableness Review After Booker*, 43 HOUS. L. REV. 325, 331–32 (2006); see also Adam Lamparello, *The Unreasonableness of “Reasonableness” Review: Assessing Appellate Sentencing Jurisprudence after Booker*, 18 FED. SENT’G REP. (forthcoming Mar. 2006) (manuscript at 1, on file with author) (lamenting that post-*Booker* reasonableness review in the circuit courts reflects “misplaced reliance on the Guidelines’ now-advisory sentencing ranges”).

22. *Booker*, 125 S. Ct. at 767.

23. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 5 & n.12 (1998) (reviewing “strongly critical” views of federal judges concerning the Guidelines); G. Thomas Eisele, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, 55 FED. PROBATION 16, 20–21 (1991) (discussing the “outcry” from judges that federal sentencing is “fundamentally flawed”); Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 180–81 (1995) (reviewing judicial complaints about the Guidelines); José A. Cabranes, Perspective, *Sentencing Guidelines: A Dismal Failure*, N.Y.L.J., Feb. 11, 1992, at 2; John S. Martin, Jr., Op-Ed., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

might have expected a radical transformation of federal sentencing after the Supreme Court declared the Guidelines advisory. Based on a year of experience with the *Booker* remedy, however, it now appears that Justice Breyer largely succeeded in preserving the fundamental pre-*Booker* features of federal sentencing. Despite changing the Guidelines from mandates to advice, the *Booker* decision does not appear to have radically transformed either basic practices or typical outcomes in the federal sentencing system.

Since the first weeks after *Booker*, district courts have been engaged in a dynamic debate over the precise weight to give the Guidelines now that they are only advisory.²⁴ But this debate probably should be considered more a matter of style than substance because there is universal lower court agreement that, after *Booker*, district judges must still properly calculate guideline sentencing ranges and must still provide a reasoned justification for any decision to deviate from the Guidelines.²⁵ Moreover, beyond the work of district courts, the activities of other players in the federal sentencing system have not changed radically: probation officers are still preparing presentence reports relying on the same sources of information as before *Booker*, prosecutors and defendants are still dickering over guideline application issues in plea negotiations and before sentencing courts, district courts are still relying on uncharged conduct in calculating the (now advisory) guidelines sentencing ranges, and appellate courts are still primarily concerned with whether guideline ranges have been properly calculated.²⁶

24. Compare *United States v. Ranum*, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005) (suggesting judges now “must consider all of the applicable factors” of § 3553(a) because “*Booker* is not [] an invitation to do business as usual”); with *United States v. Wilson*, 350 F. Supp. 2d 910, 925 (D. Utah 2005) (suggesting courts should give “heavy weight” to sentencing Guidelines in determining appropriate sentence after *Booker*).

25. One of the first major circuit court decisions about *Booker*, *United States v. Crosby*, stressed these points, and subsequent circuit court rulings have continued to reiterate and reinforce these points. See *United States v. Crosby*, 397 F.3d 103, 113–14 (2d Cir. 2005); see also *United States v. Dean*, 414 F.3d 725, 729–30 (7th Cir. 2005); *United States v. Crawford*, 407 F.3d 1174, 1179 (11th Cir. 2005); *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005); *United States v. Mares*, 402 F.3d 511, 518–19 (5th Cir. 2005). See generally King, *supra* note 21, at 328–29 & n.20; Lamparello, *supra* note 21 (manuscript at 4, on file with author) (emphasizing and criticizing the centrality given to the Guidelines in the ways circuit courts are approaching reasonableness review).

26. See David L. McColgin & Brett G. Sweitzer, *Grid & Bear It: Post-Booker Litigation Strategies—Part I*, CHAMPION, Nov. 2005, at 50 (discussing the “early trend toward business-as-usual sentencing after *Booker*”); see also Sandra Guerra Thompson, *The Booker Project: The Future of Federal Sentencing*, 43 HOUS. L. REV. 269, 269 (2006) (describing “the cumulative result [of *Booker*] . . . as ‘much ado about nothing,’ or at least much ado about not very much”); Neil Weinberg, *Lock ‘Em Up*, FORBES, Jan. 30, 2006, at 48 (noting that “[n]ot much has changed” since *Booker*).

Indeed, a year after *Booker*, lower court opinions and cumulative post-*Booker* data suggest that the legal and political culture has made the federal sentencing system almost impervious to dramatic change.²⁷ *Booker*'s muted impact on federal sentencing practices and outcomes highlights that the pre-*Booker* legal culture acclimated case-level sentencing decisionmakers—judges, prosecutors, defense attorneys, and probation officers—to a rule-bound sentencing process that, through judicial fact-finding, resulted in significant terms of imprisonment for most federal offenders. In addition, the pre-*Booker* political culture was marked by system-wide sentencing decisionmakers—Congress, the Commission, the Department of Justice—becoming astute at enforcing compliance with a rule-bound sentencing process. Consequently, a full year after *Booker*, we observe (1) a federal sentencing process that still remains exceedingly focused on guideline calculations based on judicial fact-finding, and (2) federal sentencing outcomes in which most sentences are still imposed within the (now advisory) guideline ranges and in which most offenders are still receiving significant terms of imprisonment.

In short, a culture of guideline compliance has persisted after *Booker*. Indeed, as applied by the lower courts, the *Booker* decision appears to have only slightly mitigated the rigidity and severity of the federal sentencing system, and it has perhaps aggravated the system's overall complexity. These realities are borne out by a review of the post-*Booker* case law, in which a number of judges have stressed the importance of continuing to follow the Guidelines in nearly all cases.²⁸ In addition, data on post-*Booker* sentencing outcomes released by the Commission reveals only relatively small changes in the patterns of sentencing outcomes.²⁹

27. See generally James G. Carr, *Some Thoughts on Sentencing Post-Booker*, 17 FED. SENT'G REP. 295, 295–96 (2005) (detailing why the influence and impact of prosecutors and appellate courts ensures that the new sentencing discretion *Booker* gives to district judges likely will not dramatically alter the day-to-day realities of the federal sentencing system).

28. See, e.g., *United States v. Valencia-Aguirre*, 409 F. Supp. 2d 1358, 1380 (M.D. Fla. 2006) (“The district judge is not free to establish sentencing policy, trump Congress or the Commission, or exhibit the badges of sovereignty to which the office of judge is entitled.”); *United States v. Tabor*, 365 F. Supp. 2d 1052, 1060 (D. Neb. 2005) (“We should maintain the status quo when exercising our *Booker* discretion within the context of the crack cocaine Guidelines because we are judges and not legislators and because the status quo is what Congress has chosen.”); *Wilson*, 350 F. Supp. 2d at 912 (“[T]he court will only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons.”).

29. The Commission has made a considerable effort to provide “real-time” data on post-*Booker* sentencing around the nation. The Commission’s periodic data reports are

Sentencing Commission Chair Judge Ricardo Hinojosa has noted that “[t]he sentencing trends for the post-*Booker* data have remained relatively stable.”³⁰ The post-*Booker* sentencing data released by the Commission reveal a noticeable decline in the national average of “within range” guideline sentences,³¹ although a within-guideline sentence is still imposed in nearly two out of every three cases.³² And, when a below-guideline sentence is imposed, that result is still twice as likely to be the result of a prosecutor’s recommendation to impose a lower sentence than the result of an independent determination by the sentencing judge.³³ Moreover, as the number of below-guideline sentences have increased after *Booker*, so too have the number of above-guideline sentences.³⁴ Perhaps most critically, the Commission’s post-*Booker* data reveal that average and median sentences in nearly all categories of crimes are virtually unchanged from pre-*Booker* levels³⁵ (although the data reveal a halting of recent trends in which average and median sentence lengths were increasing steadily).³⁶ Viewed *in toto*, the

available on a special *Booker/Fanfan* page of the Commission’s website. See U.S. Sentencing Comm’n, *Booker and Fanfan Materials*, <http://www.ussc.gov/bf.HTM> (last visited Apr. 22, 2006).

30. See *Sentencing Commission Feels the Effect of Booker and Blakely*, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Dec. 2005, at 10, 11 (interview with Sentencing Commission Chair Judge Ricardo H. Hinojosa).

31. See U.S. SENTENCING COMM’N, SPECIAL POST-BOOKER CODING PROJECT 7 (Mar. 30, 2006) [hereinafter USSC Post-*Booker* data], available at http://www.ussc.gov/Blakely/PostBooker_033006.pdf; see also U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING vii (Mar. 2006) [hereinafter USSC *Booker* Report] available at http://www.ussc.gov/booker_report/Booker_Report.pdf (noting that “[t]he rate of imposition of non-government-sponsored, below-range sentences has increased after *Booker*”).

32. See USSC Post-*Booker* data, *supra* note 31 (detailing that nearly 62% of all cases are sentenced within the applicable guideline range); see also USSC *Booker* Report, *supra* note 31, at vi (noting that “[t]he majority of federal cases continue to be sentenced in conformance with the sentencing guidelines”).

33. See USSC Post-*Booker* data, *supra* note 31, at 1 (detailing that just over 24% of all cases are sentenced below the applicable guideline range at the request of the government, while just over 12% of all cases are sentenced below the applicable guideline range as a result of a judge’s independent decision).

34. See *id.* at 7 (showing that nationally 1.7% of all defendants receive sentences above the guideline range after *Booker*, whereas only 0.8% of defendants received such sentences before *Booker*).

35. See *id.* at 15 (reporting insignificant changes in sentence length for various crimes before and after *Booker*); see also USSC *Booker* Report, *supra* note 31, at vii (noting that “[t]he severity of sentences imposed has not changed substantially across time” before and after *Booker*).

36. See Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Sentencing Behavior of Federal District Judges After Booker*, 43 HOUS. L. REV. 279, 310-11 (2006) (discussing the stricter enforcement of

Commission's data suggest that, after *Booker*, federal sentencing judges are exercising their new discretion relatively sparingly and in ways that only mildly alter the ultimate bottom line of final sentencing outcomes for federal defendants.

And yet, though there has not been a dramatic shift in federal sentencing practices or outcomes in *Booker*'s wake, *Booker* has certainly had a tangible and consequential effect on federal sentencing in some courtrooms and for some cases. This reality is evidenced most clearly through written sentencing opinions by certain district judges who stress that *Booker* demands a shift in a judge's approach to and attitudes about following the Guidelines.³⁷ Especially in those cases where sentence terms suggested by the Guidelines seem particularly severe—such as in crack offenses³⁸—judges seem prepared and often eager to make use of their new post-*Booker* discretion. These cases suggest that sentencing after *Booker* at least sometimes reflects what one recent report has called “a new methodology of judicial deliberation.”³⁹ In the words of this report, at least some sentencing judges, by engaging in a form of “rational jurisprudence and thoughtful statutory interpretation,” are now relying on their new post-*Booker* authority to more effectively “evaluate all statutorily prescribed factors” at sentencing.⁴⁰

Though these cases and key written decisions may not provide a fully representative sample of post-*Booker* work in the district courts, they do suggest that *Booker* has at least prompted

sentencing policies during recent years).

37. See, e.g., *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728, 731–32 (E.D. Va. 2005) (“In some cases, . . . it may be appropriate for the Court to exercise its discretion in order to minimize . . . sentencing disparities . . .”); *United States v. Jaber*, 362 F. Supp. 2d 365, 367 (D. Mass. 2005) (“The *Booker* decision obligated many courts to reconsider individual sentences imposed under the mandatory regime.”); *United States v. Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (indicating that *Booker* “raises the question of how much weight [a] [c]ourt should give to the now advisory Guidelines”); *United States v. Myers*, 353 F. Supp. 2d 1026, 1029 (S.D. Iowa 2005) (“[T]his Court views *Booker* as an invitation . . . to the type of careful analysis of the evidence that *should* be considered when depriving a person of his or her liberty.”); *United States v. Ranum*, 353 F. Supp. 2d 984, 985–87 (E.D. Wis. 2005) (“[C]ourts may no longer uncritically apply the guidelines . . .”).

38. See *United States v. Perry*, 389 F. Supp. 2d 278, 289 (D.R.I. 2005) (discussing the 100:1 ratio for cocaine to crack in the quantity-based sentencing scheme); *Simon v. United States*, 361 F. Supp. 2d 35, 47 (E.D.N.Y. 2005) (stating that there is a “harsh difference in treatment between crack and other drugs”); *United States v. Smith*, 359 F. Supp. 2d 771, 780 (E.D. Wis. 2005) (noting the “unjustifiably harsh crack penalties”).

39. See RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, SENTENCING WITH DISCRETION: CRACK COCAINE SENTENCING AFTER *BOOKER* 20 (2006), <http://www.sentencingproject.org/pdfs/crackcocaine-afterbooker.pdf>.

40. *Id.*

an important change in the sentencing decisionmaking of some judges. Indeed, these decisions, along with anecdotal reports from persons involved in day-to-day federal sentencing proceedings, spotlight what might be viewed as *Booker's* primary positive consequences. The *Booker* decision generally has made (or at least can make) federal sentencing decisionmaking more balanced, transparent, and proportional by (1) improving the balance between the application of structured sentencing rules and judicial discretion;⁴¹ (2) improving the balance between the impact of judicial and prosecutorial discretion at sentencing;⁴² (3) improving the opportunities for district judges to exercise reasoned sentencing judgment to tailor sentences to individual case circumstances;⁴³ (4) reordering sentencing outcomes (at least slightly) so that those defendants most deserving of reduced (or increased) sentences are getting the benefits (or detriments) of expanded judicial authority to sentence outside the Guidelines.

In short, to the extent *Booker* has changed federal sentencing at all, it appears *Booker's* changes have been mostly for the better and have furthered the basic goals pursued by Congress when it enacted the Sentencing Reform Act. At least right now it does appear, as was predicted by the *Blakely* Task Force of the American Bar Association's Criminal Justice Section, that "[t]he advisory remedy crafted in *Booker* may well prove as good as or even better than the mandatory guidelines in achieving the original objectives of the Sentencing Reform Act."⁴⁴

41. The *Blakely* Task Force of the American Bar Association's Criminal Justice Section emphasized this point in a report released soon after the *Booker* decision. The report asserted that "*Booker* yields an innovative mix of sentencing procedures that may well yield excellent results" through its "salutary balance between rule and discretion." ABA CRIMINAL JUSTICE SECTION, REPORT AND RECOMMENDATION ON *BOOKER* (Jan. 2005), reprinted in 17 FED. SENT'G REP. 335, 336-37 (2005) [hereinafter ABA Report on *Booker*].

42. In a recent article, Northern District of Ohio Chief Judge James Carr stressed the imbalance resulting from unregulated prosecutorial power within a mandatory guideline system, and he celebrated the fact that "*Booker* has restored judicial discretion. . . . [T]hat discretion is regulated, reviewable, and restricted." See Carr, *supra* note 27, at 297. In Chief Judge Carr's words: "Since *Booker*, we have balance and control. Before, we had neither." *Id.*

43. See Berman, *Conceptualizing Booker*, *supra* note 3 (manuscript at 38, on file with author) (discussing the ways in which the *Booker* remedy emphasizes and in effect requires federal judges to now exercise reasoned judgment in their sentencing determinations); see also KING & MAUER, *supra* note 39, at 2 (making similar points about the dynamics of post-*Booker* sentencing decisionmaking).

44. ABA Report on *Booker*, *supra* note 41, at 340. Notably, another public policy group in addition to the American Bar Association seems quite fond of the transformation that *Booker* brought to federal sentencing. The Constitution Project's Sentencing Initiative, a bipartisan, blue-ribbon committee, created after the Supreme Court's decision in *Blakely*, released in June 2005 what it calls "Principles for the Design and Reform of Sentencing Systems." These aspirational principles for criminal sentencing systems

Of course, *Booker's* apparently small, but perhaps still consequential, changes to federal sentencing have not received praise from all quarters. In testimony presented at two separate hearings before a subcommittee of the House of Representatives following the *Booker* decision, representatives speaking on behalf of the Department of Justice suggested that there was a need for legislative action in response to *Booker*.⁴⁵ In testimony presented only a month after *Booker*, then-Assistant Attorney General Christopher Wray spoke of “vulnerabilities that are inherent in advisory guidelines,” and he emphasized the potential for greater sentencing disparity in the wake of *Booker*.⁴⁶ Wray also spotlighted a distinct and important concern for the Justice Department, namely that an advisory guideline system might result in “reduced incentive for defendants to enter early plea agreements or cooperation agreements with the government”⁴⁷ At a follow-up hearing in March 2006, Principal Associate Deputy Attorney General William Mercer echoed similar themes when arguing that sentencing “consistency and accountability are eroding” as a result of the *Booker* ruling.⁴⁸

Similarly, in a major policy speech delivered to a conference of the National Center for Victims of Crime in June 2005, Attorney General Alberto Gonzales discussed the impact of *Booker* on federal sentencing and asserted that “the advisory guidelines system we currently have can and must be improved.”⁴⁹ In his speech, Gonzales provided anecdotal accounts

include a statement of “several serious deficiencies” in “[t]he federal sentencing guidelines, as applied prior to *United States v. Booker*,” and they champion a judge-centered sentencing guidelines system, managed by a sentencing commission and regulated by appellate review, that seems in perfect harmony with the basic themes and specific mandates of the *Booker* remedy. See The Constitution Project, The Constitution Project’s Sentencing Initiative (June 2005), http://www.constitutionproject.org/pdf/sentencing_principles2.pdf, reprinted in 17 FED. SENT’G REP. 341, 341 (2005).

45. *Implications of the Booker/Fanfan Decisions for the Federal Sentencing Guidelines: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security*, 109th Cong. 8 (2005) [hereinafter *Booker* 2005 Hearings] (prepared statement of Christopher A. Wray, Assistant U.S. Att’y Gen.) [hereinafter Wray testimony]; *United States v. Booker: One Year Later—Chaos or Status Quo? Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security*, 109th Cong. (2006) [hereinafter *Booker* 2006 Hearings] (prepared statement of William W. Mercer, Principal Assoc. Deputy Att’y Gen., U.S. Dep’t. of Justice) [hereinafter Mercer testimony], available at <http://www.judiciary.house.gov/media/pdfs/mercer031606.pdf>. A webcast of the 2006 hearings is available at <http://www.judiciary.house.gov/oversight.aspx?ID=225>

46. Wray testimony, *supra* note 45, at 11.

47. *Id.* at 13.

48. Mercer testimony, *supra* note 45, at 3.

49. Alberto Gonzales, U.S. Att’y Gen., Federal Sentencing Guidelines Speech (June 21, 2005), in 17 FED. SENT’G REP. 324, 326 (2005) [hereinafter Gonzales Speech].

of problems created by *Booker*, and he claimed that, since *Booker*, there has been “an increasing disparity in sentences, and a drift toward lesser sentences.”⁵⁰ Gonzales also asserted that after *Booker* “key witnesses are increasingly less inclined to cooperate with prosecutors.”⁵¹

The concerns expressed by the Department of Justice are, to some extent, borne out by post-*Booker* sentencing data and case law. Interestingly, there is scant evidence to directly support the suggestion that the *Booker* remedy has seriously impacted the government’s ability to encourage pleas or cooperation. Recent high-profile plea deals suggest that “key witnesses” remain willing to cooperate even though the Guidelines are no longer mandatory, no doubt because the Guidelines and other sentencing realities still ensure that true cooperation gets rewarded (and a lack of cooperation gets penalized) at sentencing. The latest Commission statistics show post-*Booker* rates of pleas and cooperation that are relatively comparable to pre-*Booker* rates of pleas and cooperation.⁵² But there is significantly more evidence to support concerns about greater disparity in sentencing procedures and outcomes after *Booker*. Circuit-by-circuit and district-by-district data reveal that the impact of greater judicial discretion has been spread unevenly in courtrooms across the country.⁵³ And published opinions as well as anecdotal reports document some significant judge-to-judge differences in the resolution of various important post-*Booker* legal and practical issues.⁵⁴

The defense bar also has gripes about the post-*Booker* world, though most center on the fact that *Booker* has thus far failed to

50. *Id.* at 325–26.

51. *Id.* at 325.

52. See USSC Post-*Booker* data, *supra* note 31, at 7.

53. See *id.* at 16–18.

54. Compare *United States v. Perry*, 389 F. Supp. 2d 278, 299 (D.R.I. 2005) (explaining in detail why a sentencing court should not blindly follow the severe penalty structure of the crack Guidelines), with *United States v. Tabor*, 365 F. Supp. 2d 1052, 1058 (D. Neb. 2005) (“[A] judge ought not play legislature and should instead give the crack Guidelines substantial or heavy weight after *Booker*.”); compare *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 963 (E.D. Wis. 2005) (“[I]t may be appropriate in some cases for courts to exercise their discretion to minimize the sentencing disparity that fast-track programs create.”), with *United States v. Perez-Chavez*, No. 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005) (concluding that it would be inappropriate for a district court to consider the impact of fast-track programs at sentencing); compare *United States v. Ranum*, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005) (stating that judges must carefully weigh all relevant factors and “sentence the person before them as an individual”), with *United States v. Wilson*, 350 F. Supp. 2d 910, 914 (D. Utah 2005) (“In all but the most unusual cases, the appropriate sentence will be the Guidelines sentence.”).

significantly impact district courts' sentencing practices and that some courts are adhering to the Guidelines as a matter of course.⁵⁵ In addition, stressing that guideline ranges still have "a definite and measurable effect on the loss of liberty," the defense bar has lamented the fact that some of the procedural rights and principles championed in *Blakely* and in the merits portion of the *Booker* ruling have been undermined by the continued use of lax sentencing procedures in the application of the now advisory Guidelines.⁵⁶

Finally, and not to be overlooked in any tally of *Booker*'s pros and cons, all federal sentencing participants—case-specific actors such as judges, prosecutors, defense attorneys, probation officers, as well as system-wide policymakers such as members of Congress and the Commission—necessarily confront enduring uncertainty about lawful and appropriate sentencing laws and procedures. Though answering the most basic questions about the Guidelines' status as a result of its *Blakely* ruling, the Supreme Court in *Booker* ultimately raised more questions than it answered concerning the day-to-day particulars of operating an advisory sentencing guideline system. Consequently, the only legal certainty in the period after *Booker* has been, and will continue to be, that lots and lots of lower court litigation is necessary to work out the inevitable and challenging kinks of transforming a mandatory sentencing system into an advisory one.⁵⁷

55. See, e.g., Letter from Joe M. Sands, Fed. Pub. Defender, to the Honorable Ricardo H. Hinojosa, U.S. Sentencing Comm'n 2 (Jan. 10, 2006) [hereinafter Defender letter], http://www.fd.org/pdf_lib/Federal%20Sentencing.pdf (noting that this "approach is indistinguishable from the mandatory system just struck down"); see also Testimony of Kathleen M. Williams, Fed. Pub. Defender to the U.S. Sentencing Commission (Mar. 15, 2006) [hereinafter Williams testimony] (calling upon the U.S. Sentencing Commission to make wholesale changes to the federal sentencing system after *Booker* to remedy a range of pre-*Booker* problems), available at http://www.uscc.gov/hearings/03_15_06/Kathleen-Williams.PDF.

56. See Defender letter, *supra* note 55, at 21; see also Williams testimony, *supra* note 55, at 3 (urging the Sentencing Commission to "pursue improved procedural fairness at sentencing").

57. See News Release, Admin. Office of the U.S. Courts, Legal Decisions, Legislation & Forces of Nature Influence Federal Court Caseload in FY 2005 (Mar. 14, 2006) [hereinafter *Legal Decisions*], available at http://www.uscourts.gov/Press_Releases/judbus031406.html (noting increases in filings and appeals attributable to *Blakely* and *Booker*). A panel of the Sixth Circuit has described the litigation mess in the wake of *Booker* in quite colorful terms: "Achieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow. The courts have particularly struggled to—and often failed at—properly applying the remedial portion of *Booker* along with the remedy." *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006).

III. PROPOSED RESHUFFLES AND THEIR PROBLEMS

As developed in Part II, there are virtues and vices to be found in the federal sentencing system that *Booker* has produced. But every possible sentencing system has virtues and vices—including, of course, the federal sentencing system operative before *Booker*⁵⁸—and any debate over post-*Booker* reforms must necessarily examine whether and how the status quo might be effectively improved. This Part highlights how the leading “*Booker* fixes” (i.e., the major changes to the federal sentencing system that have been proposed in the wake of *Booker*) necessarily present significant legal, policy, and practical problems. Moreover, as this Part explains, after a recent period of extraordinary legal turmoil and uncertainty, federal policymakers would be wise to pursue a course of sentencing reform that might minimize instability in the federal system. This Part thus concludes that small changes to the current advisory guideline system—*Booker* tweaks—are to be preferred to any major *Booker* fix.

A. *Proposals for “Topless Guidelines”*

1. *The “Topless” Essentials.* Though many early reactions to *Booker* were cautious and suggested a “wait and see” attitude,⁵⁹ within a few months concrete proposals for specific legislative responses to *Booker* began to emerge. The most surprising and provocative proposal appeared as a sudden add-on to a drug sentencing bill in the House of Representatives, House Bill 1528, entitled “Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005.”⁶⁰ Just before a scheduled hearing in April 2005 on the main provisions of this bill, a new elaborate section 12 was tacked on with provisions that would essentially forbid judicial

58. See generally U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM (2004), http://www.ussc.gov/15_year/15year.htm (reviewing research literature and sentencing data to assess how well the Guidelines before *Booker* achieved the goals for sentencing reform established by Congress in the Sentencing Reform Act of 1984) (last visited Apr. 22, 2006). See also *infra* note 85 and accompanying text (discussing problems with pre-*Booker* federal sentencing).

59. See, e.g., Jack King, *NACDL Leadership, Former U.S. Attorneys, Judge, Warn Congress on Perils of Hasty Federal Sentencing ‘Reform,’* CHAMPION, Apr. 2005, at 6 (advising Congress to avoid “any quick legislative fixes to the federal sentencing guidelines”).

60. Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528, 109th Cong. (2005) .

consideration of nearly all mitigating factors as a basis for sentencing below guideline ranges.⁶¹ Section 12 also proposed significant procedural restrictions on any possible remaining grounds for downward departure from the Guidelines (except for departures based on a prosecutor's motion in recognition of an early plea agreement or substantial assistance in the prosecution of others).⁶²

A few months after section 12 of House Bill 1528 was proposed, the Justice Department began to advocate a distinct, but somewhat similar, legislative response to *Booker*. In his June 2005 speech to the National Center for Victims of Crime, Attorney General Alberto Gonzales, after asserting "that the advisory guidelines system we currently have can and must be improved," outlined his preferred response to *Booker*.⁶³ Gonzales explained that he favored "the construction of a minimum guideline system" in which "the sentencing court would be bound by the guidelines minimum, just as it was before the *Booker* decision."⁶⁴ However, in order to permit judicial fact-finding and yet evade the constitutional problems addressed in *Blakely* and *Booker*, under Gonzales's proposal the guidelines maximum "would remain advisory, and the court would be bound to consider it, but not bound to adhere to it, just as it is today under *Booker*."⁶⁵

Though varying in their particulars, the provisions of House Bill 1528 and the minimum guideline system advocated by Attorney General Gonzales are both essentially variations on the idea of topless guidelines first put forth by Professor Frank Bowman in the immediate aftermath of the Supreme Court's decision in *Blakely v. Washington*. In a series of memoranda to the Commission, Professor Bowman ingeniously suggested

61. See *id.* § 12(g)(2) (as introduced in the House of Representatives, Apr. 6, 2005) (specifically listing the factors a judge may consider in sentencing outside the guidelines range).

62. *Id.* § 12(a)(3).

63. Gonzales Speech, *supra* note 49, at 326; see also notes 49–51 and accompanying text (discussing other aspects of Gonzales's speech).

64. See Gonzales Speech, *supra* note 49, at 326.

65. *Id.* In an August 2005 speech at the American Bar Association's Annual Meeting in Chicago, Attorney General Gonzales reiterated the points he made in his June speech and again urged "the construction of a minimum guideline system." See Alberto R. Gonzales, U.S. Att'y Gen., Prepared Remarks Delivered to ABA House of Delegates (Aug. 8, 2005), available at <http://www.usdoj.gov/ag/speeches/2005/080805agamericanbarassoc.htm>. Likewise, in testimony presented to a House of Representatives subcommittee in March 2006, Principal Associate Deputy Attorney General William Mercer restated and strongly advocated the Justice Department's interest in a legislative response to the *Booker* ruling in the form of a "minimum guideline system." Mercer testimony, *supra* note 45, at 31–35.

simply taking the “top” off existing guideline ranges in order to allow the Guidelines to operate as mandatory rules adjusting minimum sentences while still permitting judicial fact-finding because that fact-finding would no longer impact applicable maximum sentences.⁶⁶ As Professor Bowman explained in his memos, because *Blakely* applied the Sixth Amendment to judicial fact-finding raising the maximum sentence a defendant faces, and because the Supreme Court in *Harris v. United States* had reaffirmed that facts triggering mandatory minimum sentences could be found by a judge,⁶⁷ it would apparently be constitutional for judges to engage in judicial fact-finding within a mandatory guideline system as long as the Guidelines technically only controlled minimum sentencing terms and not the legal maximum.⁶⁸

Notably, Professor Bowman suggested the creation of topless guidelines as only a short-term remedy to avoid immediate post-*Blakely* chaos in the federal criminal system, and he has disavowed this proposal as a long-term solution for federal sentencing after *Booker*.⁶⁹ Nevertheless, as evidenced by the provisions of section 12 of House Bill 1528 and Attorney General Gonzales’s advocacy of a minimum guideline system, some members of Congress and the Justice Department clearly see long-term value in a legislative response to *Booker* that severely circumscribes judges’ post-*Booker* discretion to sentence below the current guideline ranges.

A topless guideline *Booker* fix clearly attempts an end-run around the constitutional issues raised in *Blakely* and *Booker*: rather than require aggravating facts that raise sentences to be proven to a jury, the topless guideline proposals seek to firm up the bottom of guideline ranges while still relying upon judges to find the facts that increase the minimum guideline sentence a

66. See Memorandum from Frank Bowman to U.S. Sentencing Comm’n (June 27, 2004), reprinted in 16 FED SENT’G REP. 364, 367 (2004) [hereinafter Bowman *Blakely* Memo]; Memorandum from Frank Bowman to U.S. Sentencing Comm’n (July 16, 2004), reprinted in 16 FED SENT’G REP. 369, 371 (2004) [hereinafter Bowman Legislative Solutions Memo].

67. *Harris v. United States*, 536 U.S. 545, 567–69 (2002).

68. See Bowman *Blakely* Memo, *supra* note 66, at 367; Bowman Legislative Solutions Memo, *supra* note 66, at 371.

69. *Booker* 2005 Hearings, *supra* note 45, at 33–34 (testimony of Frank O. Bowman, III). As detailed *infra* in Part III.B, since the *Booker* ruling, Professor Bowman has been advocating a form of simplified guidelines incorporating jury findings as the ideal sentencing structure for the federal sentencing system in the wake of *Blakely* and *Booker*. E.g., Frank O. Bowman, III, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI LEGAL F. 149, 149–50.

defendant faces.⁷⁰ The apparent goal and animating spirit of topless guideline proposals is to replicate essential pre-*Booker* federal sentencing realities by recreating (or even expanding) pre-*Booker* limits on the exercise of judicial discretion to sentence below the Guidelines without respecting the jury trial rights championed in *Blakely* and *Booker*.⁷¹ But, of course, a topless guideline system would not completely replicate the pre-*Booker* system because it could not and would not significantly circumscribe judges' discretion to sentence above applicable guideline ranges. Thus, a topless guideline *Booker* fix would only recreate pre-*Booker* limits on judicial discretion to impose sentences more lenient than the Guidelines recommend and would not significantly restrict judges' post-*Booker* authority to impose sentences more severe than the Guidelines recommend.⁷²

2. *The "Topless" Problems.* A careful examination of post-*Booker* realities reveals that any kind of topless guideline system raises a host of legal, policy, and practical problems. Enactment of such a *Booker* fix would engender numerous constitutional questions and other doctrinal concerns, which in turn could produce significant turmoil and uncertainty in sentencing practices and outcomes as courts examine and resolve these legal issues. Moreover, recreating (or expanding) pre-*Booker* limits on the exercise of judicial discretion could perpetuate (or exacerbate) the worst aspects of the pre-*Booker* operation of the Guidelines.

First and foremost, the basic constitutionality of a topless guidelines system would thus necessarily be uncertain because it must rely upon the Supreme Court's *Harris* ruling in which the Court, in a fractured opinion, reaffirmed that judges are permitted to find those facts that trigger mandatory minimum sentences.⁷³ Significantly, in *Harris*, four Justices, led by Justice

70. See *Booker* 2006 Hearings, *supra* note 45 (prepared statement of Paul G. Cassell, U.S. Dist. J. for the Dist. of Utah) [hereinafter Cassell testimony], available at <http://www.judiciary.house.gov/media/pdfs/cassell031606.pdf> (explaining that the topless guidelines scheme "looks like a gimmick" because it "makes an end run around the Supreme Court's constitutional pronouncements that juries have an important role to play in criminal sentencings").

71. See, e.g., Bowman *Blakely* Memo, *supra* note 66, at 367; Gonzales Speech, *supra* note 49, at 325–26; see also Cassell testimony, *supra* note 70 (discussing critically the goals and components of the topless guidelines proposal).

72. As noted earlier, see *supra* note 34, the number of sentences imposed above guideline ranges has doubled after *Booker* (although the number of above guideline range sentences remains much lower than the number of below-range sentences).

73. See *Harris v. United States*, 536 U.S. 545, 568–69 (2002). The Supreme Court first formally upheld judicial fact-finding for the imposition of mandatory minimum sentences in *McMillan v. Pennsylvania*, 477 U.S. 79, 86–89 (1986). A fractured Court ultimately held in *Harris* that the 2000 decision in *Apprendi*, finding constitutional

Thomas, asserted that judicial fact-finding to trigger mandatory minimum sentences was unconstitutional.⁷⁴ A fifth Justice, Justice Breyer, in his concurrence candidly admitted that he could not “easily distinguish *Apprendi v. New Jersey* from this case in terms of logic” and suggested he might subsequently change his view on the permissibility of judicial fact-finding to set mandatory minimum sentences.⁷⁵ Moreover, in light of the subsequent rulings in *Blakely* and *Booker* and recent Supreme Court transitions, arguably there is now not a single certain vote on the Supreme Court to uphold the constitutionality of a topless guideline system, despite the recent *Harris* ruling.⁷⁶

Beyond the constitutional questions raised by the shaky *Harris* precedent, other constitutional challenges could (and surely would) be lodged against a topless guideline system. In a footnote of its *Apprendi* decision, the Supreme Court warned legislatures against extensive revision of criminal codes to evade the constitutional protections that the Fifth and Sixth Amendments afford criminal defendants.⁷⁷ That footnote and other similar pronouncements suggest the Supreme Court might not countenance an obvious effort to circumvent its rulings in *Apprendi* and *Blakely*.⁷⁸ The enactment of a topless guideline

problems with judicial fact-finding that raised applicable maximum sentences, did not require reversal of *McMillan*. See *Harris*, 536 U.S. at 568–69.

74. See *Harris*, 536 U.S. at 572, 577–79 (Thomas, J., dissenting) (“There are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum.”).

75. *Id.* at 569 (Breyer, J., concurring) (citation omitted).

76. Since *Harris* was decided, two of the Justices who voted to uphold judicial fact-finding to trigger mandatory minimum sentences have been replaced: Chief Justice William Rehnquist has been replaced by Chief Justice John Roberts, and Associate Justice Sandra Day O’Connor has been replaced by Associate Justice Samuel Alito. As of this writing, the views of these two new Justices concerning the scope and application of Sixth Amendment rights are hard to predict with any confidence.

In addition, since *Harris* was decided, the other two Justices who voted to uphold judicial fact-finding to trigger mandatory minimum sentences have discussed modern sentencing reforms in ways that perhaps suggest they might have doubts about the constitutionality and appropriateness of a topless guideline system. In 2004, Justice Scalia authored the *Blakely* decision, which speaks in exceptionally broad terms about the importance of jury trial rights. See *Blakely v. Washington*, 124 S. Ct. 2531, 2538–40 (2004) (recognizing that the very reason for the jury-trial guarantee is the unwillingness to trust government to define the jury’s role). In 2003, Justice Kennedy delivered a powerful speech to the American Bar Association in which he lambasted the harshness and rigidity of mandatory minimums and the Guidelines. See Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourt.us.gov/publicinfo/speeches/sp_08-09-03.html (“I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”).

77. *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000).

78. See *Blakely*, 124 S. Ct. at 2539 & n.10 (suggesting the Court prefers a bright-

system might well prompt the Court to make good on its threats to more directly police legislative definitions of crimes and applicable punishments.⁷⁹

Further, the structural imbalances integral to a topless guideline *Booker* fix might raise distinct constitutional concerns, especially as a result of recent changes to the composition of the Commission.⁸⁰ Defendants might raise separation of powers challenges by asserting that a topless guideline system unduly aggrandizes the power of the executive branch and unconstitutionally encroaches upon the judiciary's sentencing function.⁸¹ Relatedly, the tilt toward higher sentences inherent in a topless guideline system—especially in light of the power and discretion this system would give prosecutors, the Guidelines' continued reliance on uncharged and acquitted offense conduct, and the limited procedural rights afforded to defendants throughout the sentencing process—would certainly prompt (and perhaps justify) a range of new due process challenges to the operation of the system in at least some cases.⁸² And, not to be

line and functional definition of the reach of the Sixth Amendment); *see also McMillan*, 477 U.S. at 89–90 (suggesting that Courts could and would determine when a legislature had gone too far in an effort to evade affording defendants their constitutional trial rights); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (same).

79. *See* Cassell testimony, *supra* note 70, at 18 (highlighting that “the Supreme Court specifically warned legislatures against evading the constitutional protections of the Sixth Amendment by expansively extending the maximum range of all criminal sentences” and suggesting that the “topless guidelines scheme might well be the kind of legislative evasion that the Supreme Court had in mind”).

80. The PROTECT Act changed the composition of the Commission. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650 (to be codified in scattered sections of 18 U.S.C.). Section 401(n)(1) of the Act altered an original requirement that the Commission have “[a]t least three” federal judges as Commissioners to now state that “[n]ot more than 3” judges can serve as Commissioners. § 401(n)(1), 117 Stat. 675–76.

81. In *Mistretta v. United States*, the Supreme Court considered and rejected a separation of powers claim of this sort lodged against the provisions of the Sentencing Reform Act. *Mistretta v. United States*, 488 U.S. 361, 380–411 (1989) (“[W]e see no risk that the President’s limited removal power will compromise the impartiality of Article III judges serving on the Commission and, consequently, no risk that the Act’s removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies.”). However, just before *Booker* changed the Guidelines from mandates to advice, at least one federal judge concluded that the PROTECT Act’s structural changes to the Sentencing Reform Act changed certain premises that were central to the Supreme Court’s decision in *Mistretta*. *See United States v. Detwiler*, 338 F. Supp. 2d. 1166, 1174 (D. Or. 2004) (“The [PROTECT Act] require[s] a re-examination of a fundamental premise of *Mistretta*, namely, that the Sentencing Commission is part of the Judicial Branch.”).

82. Before *Booker*, defendants regularly raised an array of due process arguments against the operation of the Guidelines, typically with little success. *See, e.g., United States v. Watts*, 519 U.S. 148, 156 (1997) (rejecting petitioner’s challenge to the Guidelines’ preponderance standard). But, since the *Blakely* and *Booker* rulings, lower courts have found a range of procedural due process claims to have more force even in the

overlooked, *ex post facto* doctrines would prohibit a topless guideline *Booker* fix from being applied in cases in which the offense was committed prior to its enactment because a topless guideline system restricts discretion afforded under the *Booker* remedy. There would necessarily be a lengthy transition period between the enactment of a topless guideline system and its full operation.⁸³

One could robustly debate the significance and likely outcome of the various constitutional issues raised by a topless guideline system. But the potential constitutional infirmities of such a *Booker* fix indisputably would generate widespread litigation in lower courts over an array of complicated legal questions, which in turn would likely produce legal confusion and uncertainty concerning appropriate sentencing practices and outcomes until all these issues were definitively resolved by the Supreme Court. Whatever might be the policy merits of a topless guideline system, Congress should be extremely cautious before enacting any major structural change to federal sentencing law that would obviously engender additional legal turmoil within a criminal justice system that is already strained from dealing with the profound (and still uncertain) ripple effects of the Supreme Court's rulings in *Blakely* and *Booker*.⁸⁴

application of an advisory guideline system. *See, e.g.*, *United States v. Malouf*, 377 F. Supp. 2d 315, 318 (D. Mass. 2005); *United States v. Coleman*, 370 F. Supp. 2d 661, 671–73 (S.D. Ohio 2005); *United States v. Gray*, 362 F. Supp. 2d 714, 722–23 (S.D.W. Va. 2005); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1028–29 (D. Neb. 2005). Defendants' due process arguments likely would garner even greater strength if defendants were subject to significant sentencing increases within an imbalanced and mandatory topless guideline system. *See generally* Berman, *Pondering Process*, *supra* note 3, at 676–79 (discussing the importance of the Due Process Clause of the Fifth and Fourteenth Amendment in the Supreme Court's recent sentencing jurisprudence).

83. *See* Letter from Thomas W. Hillier, II, Fed. Pub. Defender, to F. James Sensenbrenner, Jr., Chairman, House Judiciary Comm. & John Conyers, Ranking Member, House Judiciary Comm. (Apr. 18, 2005), in 17 FED. SENT'G REP. 319, 319–20 (2005) (detailing the range of constitutional claims and other problematic legal issues that would be raised by enactment of the topless guideline reforms reflected in section 12 of House Bill 1528).

84. In the most recent legislative hearing about *Booker*'s impact before a House subcommittee, numerous witnesses emphasized the confusion and harmful disruptions that would result from a hasty or imprudent congressional response to *Booker*. *See* Cassell testimony, *supra* note 70, at 18–20 (discussing the “shock[s]” and possible “devastating consequences” to the federal sentencing system that could result from the enactment of a topless guidelines scheme); *Booker* 2006 Hearings, *supra* note 45 (prepared statement of James E. Felman, Esq.) [hereinafter Felman testimony], available at <http://www.judiciary.house.gov/media/pdfs/felman031606.pdf> (stressing that the costs of any constitutionally questionable *Booker* fix would greatly outweigh any obvious benefits).

The case for taking a cautious approach to any legislative response to *Booker* is reinforced by the Supreme Court's recent decision to grant certiorari in *Cunningham v. California*, 126 S. Ct. 1329, 1329–30 (2006) (mem.). The *Cunningham* case will address

Aside from the constitutional questions and legal tumult that would necessarily follow enactment of any sort of topless guidelines, such a *Booker* fix would also be highly problematic from a policy and practical perspective. Implicit (and sometimes explicit) in any advocacy for a topless guideline *Booker* fix is the contention that the pre-*Booker* federal sentencing system provides a gold standard that the post-*Booker* system should aspire to achieve. But, from a policy and practical perspective, pre-*Booker* federal sentencing cannot and should not be viewed as a gold standard for future reforms; not only did the pre-*Booker* sentencing system violate defendants' Sixth Amendment rights, but the pre-*Booker* sentencing system distinguished itself by virtue of its overall complexity, rigidity, and severity. And though a topless guidelines *Booker* fix might (or might not) avoid Sixth Amendment problems, such a system would constitute a step backwards in the development and evolution of the federal sentencing system by exacerbating some of the worst features of pre-*Booker* federal sentencing.

Criticisms of the structure, content, and operation of the pre-*Booker* Guidelines are legion, and they need not be fully rehearsed here.⁸⁵ However, against the backdrop of any topless guidelines *Booker* fix proposal, three interrelated concerns about the realities of the pre-*Booker* Guidelines merit emphasis: prosecutorial power, disparity, and evasion. As many

whether judicial fact-finding within California's determinate sentencing scheme violates *Blakely*; the case should further clarify (or perhaps further obscure) what sorts of judicial factfinding remain constitutionally permissible within modern structured sentencing systems. At the very least, *Cunningham* will present the newly-comprised Supreme Court with its first opportunity to elaborate on the meaning and reach of *Blakely* and *Booker*, and thus the case seems virtually certain to have a direct impact on the issues implicated in any of the proposed *Booker* fixes being considered by Congress. See Cassell testimony, *supra* note 70, at 19–20; Felman testimony, *supra*, at 9–10.

85. Even an abridged list and account of the many critiques of the pre-*Booker* Guidelines could fill volumes of this law journal. Two "classic" books that provide an especially effective review of major criticisms of the Guidelines are Kate Stith & Jose A. Cabranes's *Fear of Judging: Sentencing Guidelines in the Federal Courts* and Michael Tonry's *Sentencing Matters*. KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998); MICHAEL TONRY, *SENTENCING MATTERS* (1996). A more recent accounting of the flaws of the pre-*Booker* federal guideline system can be found in a September 2004 report of the American College of Trial Lawyers. See AM. COLL. OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED (2004). In addition, the Commission itself has recently produced a comprehensive report on the workings of the Guidelines that reviews many criticisms of the system. U.S. SENTENCING COMM'N, *supra* note 58.

Two scholars recently summarized many of these sentiments, observing that the Guidelines "have been the subject of sustained criticism from judges, lawyers, scholars, and members of Congress, and a wide consensus has emerged that the Federal Guidelines have in many ways failed." Robert Weisberg & Marc L. Miller, Introduction, *Sentencing Lessons*, 58 STAN. L. REV. 1, 2 (2005).

commentators have previously noted, the complexity, rigidity, and severity of the pre-*Booker* Guidelines combined in various way to (1) afford prosecutors enormous discretion and power in plea negotiations and at sentencing; (2) produce distinctive disparities in the application of the sentencing rules and ultimate sentencing outcomes; and (3) prompt participants in the federal sentencing system, particularly prosecutors and district judges, to seek ways to evade the application of mandatory sentencing provisions when they seem unjust in particular cases.⁸⁶ The imbalances inherent in a topless guideline system would operate to exacerbate the severity and potential complexity and rigidity of the pre-*Booker* guideline system, especially because the system would empower prosecutors to dictate minimum sentences through charging and bargaining choices while still requiring judicial application of complicated and severe sentencing enhancements. Consequently, the most problematic facets and the most disconcerting consequences in terms of prosecutorial power, disparity, and evasion experienced in the pre-*Booker* federal sentencing system would likely be aggravated by the enactment of any sort of topless guideline *Booker* fix.

86. Early articles effectively making these points about the operation of the Guidelines include Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992), and Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992). More recent works effectively make these points as well. See Bowman, *supra* note 69; see also sources cited *supra* note 85.

B. Proposals for “Blakely-ized Guidelines”

1. *The “Blakely-ized” Essentials.* In part because of the many unappealing aspects of a topless guideline system, a competing approach to fixing *Booker* has emerged in the form of various recommendations to “*Blakely-ize*” the Guidelines. The term “*Blakely-ize*” captures the idea that Congress could return to a system of mandatory sentencing guidelines by simply incorporating jury fact-finding into the federal sentencing process and thereby embrace, rather than evade, the jury trial rights championed in the Supreme Court’s *Blakely* decision.⁸⁷

Of course, the Justices dissenting from the *Booker* remedy engineered by Justice Breyer suggested a simple and straightforward means for *Blakely-izing* the Guidelines.⁸⁸ As Justice Stevens explained in his dissenting opinion, *Blakely-izing* the Guidelines would not require Congress to make any changes to the Sentencing Reform Act nor require the Commission to make any changes to the Guidelines; it would simply require Congress to express its intent for the current Guidelines to be mandatory even though *Booker* has now clarified that the Constitution demands that aggravating facts triggering longer guideline sentences have to be proven to a jury or admitted by the defendant.⁸⁹ That is, without making any legislative changes to the particulars of federal sentencing, Congress could simply restore the Guidelines to mandatory sentence rules by providing that all facts supporting upward adjustments must be proven to a jury (or admitted by a defendant).

A related alternative for a *Blakely-ized* guideline system, one which has been suggested by the American Bar Association and advocated by a number of commentators, would be to simplify

87. Scholars of sentencing reform have come to discuss responses to the *Blakely* ruling in terms of “compliance” and “avoidance” depending upon whether a jurisdiction seeks to incorporate or dodge jury fact-finding within a structured sentencing system. *See, e.g.,* Steven L. Chanenson & Daniel F. Wilhelm, *Evolution and Denial: State Sentencing After Blakely and Booker*, 18 FED. SENT’G REP. 1, 2 (2005); Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather Blakely’s Blast*, 18 FED. SENT’G REP. 12, 16 (2005); *see also* Reitz, *supra* note 4, at 1108–18 (describing responses to *Blakely* in terms of “approach” and “avoidance” methods). Described in these terms, a topless guideline *Booker* fix would be an avoidance response, whereas a *Blakely-ization Booker* fix would constitute a compliance approach.

88. *See* United States v. Booker, 125 S. Ct. 738, 772, 779 (2005) (Stevens, J., dissenting) (suggesting the Government be required to “prove any fact that is required to increase a defendant’s sentence under the Guidelines to a jury beyond a reasonable doubt”); *id.* at 795 (Thomas, J., dissenting in part) (agreeing with the remedy proposed by Justice Stevens but refusing to accept his severability and legislative history arguments).

89. *Id.* at 772, 779 (Stevens, J., dissenting).

“the guidelines by reducing both the number of offense levels and the number of adjustments and presenting the remaining, more essential, culpability factors to the jury.”⁹⁰ Here is part of the ABA’s explanation for how such a simplified *Blakely*-ized guideline system might operate and develop:

[C]ertain critical culpability factors would be charged in the indictment and presented to the jury. The jury’s verdict would yield a sentencing range within the existing statutory range that would ordinarily be binding upon the district court. Decisions regarding which guidelines factors are to be alleged in a charging instrument and proved to a jury and which should be relegated to “within range” consideration are ideally suited to a body such as the United States Sentencing Commission. . . .

. . . .

[B]ecause there is nothing in *Booker* that would prohibit downward departures, a simplification of the guidelines should preserve the ability of a district judge to depart downward based upon mitigating circumstances of a kind or to a degree not adequately considered by either the elements presented to the jury or the “within-range” advisory guidelines. . . . Because *Booker* holds that the guideline maximum is the statutory maximum, upward departures from the range established by the jury’s verdict would be impermissible. Thus, aggravating factors that would justify an upward departure from the existing guidelines would need to be added as elements for jury consideration to support an increase in the otherwise applicable range.⁹¹

2. *The “Blakely-ized” Problems.* Though not presenting quite as many constitutional questions as a topless guideline system, a *Blakely*-ization approach to “fixing” *Booker* is not without its own set of legal, policy, and practical problems. Enactment of a *Blakely*-ized guideline system would create an array of complicated legal questions concerning the relationship between trial procedures and sentencing procedures. In addition, there are also policy and practical reasons to question whether a

90. ABA Report on *Booker*, *supra* note 41, at 339; see also Bowman, *supra* note 69, at 192 (noting that the removal the more complex aspects could make the Guidelines “jury-friendly”); James Felman, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT’G REP. 97, 97 (2004) (advocating a codification of the Guidelines that includes culpability factors and greater jury control in sentencing).

91. ABA Report on *Booker*, *supra* note 41, at 339.

Blakely-ized guideline system would be workable, fair, and effective.⁹²

On the legal front, Justice Breyer's opinion for the Court in *Booker* spotlighted some serious procedural issues and legal complications that would be raised by *Blakely*-izing the current Guidelines:

[T]he sentencing statutes, read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended. How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how? Would the indictment have to allege, in addition to the elements of robbery, whether the defendant possessed a firearm, whether he brandished or discharged it, whether he threatened death, whether he caused bodily injury, whether any such injury was ordinary, serious, permanent or life threatening, whether he abducted or physically restrained anyone, whether any victim was unusually vulnerable, how much money was taken, and whether he was an organizer, leader, manager, or supervisor in a robbery gang? If so, how could a defendant mount a defense against some or all such specific claims should he also try simultaneously to maintain that the Government's evidence failed to place him at the scene of the crime? . . . How would a jury measure "loss" in a securities fraud case—a matter so complex as to lead the Commission to instruct judges to make "only . . . a reasonable estimate"? How would the court take account, for punishment purposes, of a defendant's contemptuous behavior at trial—a matter that the Government could not have charged in the indictment?⁹³

Of course, these complex and intricate questions about how to integrate jury fact-finding into the existing guideline structure result in part from the complex and intricate nature of the existing Guidelines. Because the current Guidelines are highly

92. Notably, a number of states seem to have successfully preserved the gains of modern sentencing reforms while responding to *Blakely* by incorporating jury fact-finding into their structured sentencing systems. See Chanenson & Wilhelm, *supra* note 87, at 1–2 (discussing actions taken by various states in response to *Blakely* and *Booker*); Parent & Frase, *supra* note 87, at 12–16 (stating that *Blakely* rarely applies in Minnesota because sentences are based almost entirely on the elements of the crime); see also Reitz, *supra* note 4, at 1109 (describing Kansas's presumptive sentencing system). However, there are reasons to believe that the federal sentencing system, which is *sui generis* in its complexity and its reliance on judicial fact-finding, could not and would not as easily and as comfortably incorporate jury fact-finding. See generally Ronald Wright, *The Power of Bureaucracy in the Response to Blakely and Booker*, 43 Hous. L. Rev. 389, 395–98 (2006).

93. *Booker*, 125 S. Ct. at 761–62 (second alteration in original) (citations omitted).

detailed and truly stunning in their overall complexity and were obviously developed as instructions for judges and not for juries,⁹⁴ it is all too easy for Justice Breyer to highlight the extraordinary challenges that would flow from seeking jury findings on all the issues that the existing Guidelines make pertinent to federal sentencing. Nevertheless, the ABA, which is more sympathetic to the idea of incorporating jury fact-finding into a federal guideline sentencing system, has also identified some challenging procedural issues which would need to be addressed, even in a system of simplified *Blakely*-ized Guidelines.

[T]here may be circumstances in which it will be necessary or prudent to bifurcate the jury's consideration of some elements in a manner similar to the practice in civil cases involving punitive damages. In addition, jury instructions and rules of criminal procedure would need to reflect the new system. The parties would need to be required to exchange information relating to the new "sentencing" elements of the offense in the same manner as the existing elements of the offense.⁹⁵

Notably, state systems have so far successfully navigated some of these choppy legal waters in large part because most states have a simple charge-based sentencing structure and relatively straightforward criminal codes.⁹⁶ The federal criminal

94. Doctrinal intricacies and complexities have been a feature of the system—and the justifiable focus of many complaints—since the initial Commission issued the initial Guidelines. See generally Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 442–43 (2002) (citing the "intricate nine-step sentencing process" and the "258-box grid" initially used in deriving sentences).

The initial Guidelines, promulgated by the Commission in 1987, were lengthy and highly detailed, containing over 100 multisection guidelines and comprising more than 200 pages in the first Guidelines Manual. U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS (1987). The Commission's approach and structure for guidelines sentencing, set forth in this first Guidelines Manual (and which remains in place today), involved an intricate nine-step sentencing process through which a sentencing court assesses the seriousness of a defendant's current offense and past crimes to establish an "offense level" and a "criminal history category," which are used to determine the defendant's applicable sentencing range from within a 258-box grid called the "Sentencing Table." See *id.* § 1B1.1, at 1.13 (setting forth nine steps to be followed for imposing a sentence); *id.* at ch. 5, pt. A, at 5.1–5.2 (setting forth Sentencing Table). And, fulfilling its statutory obligation to review and revise the Guidelines, the Commission has passed nearly 700 amendments to the Guidelines over the past two decades. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL app. C & app. C supp. (2005). The latest edition of the Federal Sentencing Guideline Manual now runs more than 500 pages (and also has an even lengthier separate two-part appendix that chronicles the dates and substantive changes of nearly 700 amendments).

95. ABA Report on *Booker*, *supra* note 41, at 339–40.

96. See generally Chanenson & Wilhelm, *supra* note 87 (describing different approaches to sentencing reform taken by states in reaction to *Blakely* and *Booker*);

justice system, as Justice Breyer has long emphasized, has an array of intricacies and complications which might make it especially hard to effectively sort through all the procedural issues involved in incorporating jury fact-finding into a structured sentencing system.⁹⁷

Moreover, the procedural challenges of effectively administering a system of simplified *Blakely*-ized federal guidelines could also dovetail with some of the constitutional concerns raised by a topless guideline system. Especially if the key factors driving sentencing outcomes in a *Blakely*-ized federal guidelines system were those developed exclusively by the Commission, defendants might raise new separation of powers challenges to the operation of such a system.⁹⁸ Relatedly, the incorporation of jury fact-finding into a guideline system—especially in light of traditional trial procedures, the Guidelines’ emphasis on a defendant’s criminal history and other arguably prejudicial offender-related considerations, and the historically limited procedural rights afforded to defendants throughout the sentencing process—would certainly raise (and perhaps complicate considerably) a range of due process challenges to the operation of *Blakely*-ized federal guidelines in at least some cases.⁹⁹ And, of course, *ex post facto* doctrines might prohibit *Blakely*-ized federal guidelines from being applied in cases in which the offense was committed prior to its enactment if the system were to restrict discretion afforded under the *Booker* remedy. There would thus necessarily be a lengthy transition period between the enactment of *Blakely*-ized federal guidelines

Parent & Frase, *supra* note 87 (explaining the effect of *Blakely* on sentencing in Minnesota). *But see* Reitz, *supra* note 4, at 1108–13 (highlighting that *Blakely*-ized state guidelines raise “a number of implementation issues, and a visceral judgment that these will prove solvable does not deny their troublesome existence”).

97. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3–4 (1988) (describing how the Guidelines are more complex than state sentencing guidelines).

98. As discussed previously, the Supreme Court once considered and rejected a separation of powers to the provisions and Sentencing Reform Act in *Mistretta*. *See* discussion *supra* note 81. However, a central premise of the Supreme Court’s decision in *Mistretta* was that the Commission was developing guidelines to direct judges’ sentencing determinations. *See* *Mistretta v. United States*, 488 U.S. 361, 367–68, 374–78 (1989) (describing the powers of the Commission and the purposes of the Guidelines). The constitutional equation would change considerably if the Guidelines were to operate with jury trial findings.

99. *Cf.* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005) (explaining sentencing and Sixth Amendment rights as related to capital sentencing). *See generally* Berman, *Pondering Process*, *supra* note 3, at 679–85 (discussing the uncertain status of constitutional rights, other than Sixth Amendment rights, involved at sentencing in the wake of *Blakely* and *Booker*).

and their full operation.

Legal complications aside, other policy and practical concerns are raised by a *Blakely*-ized federal guidelines system. Once again, Justice Breyer's opinion for the Court in *Booker* provides an effective primer on these concerns.

To engraft the Court's constitutional requirement onto the sentencing statutes . . . would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

. . . .

. . . Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. . . .

. . . .

The Court's constitutional jury trial requirement, however, if patched onto the present Sentencing Act, would move the system backwards in respect both to tried and to plea-bargained cases. In respect to tried cases, it would effectively deprive the judge of the ability to use post-verdict-acquired real-conduct information; it would prohibit the judge from basing a sentence upon any conduct other than the conduct the prosecutor chose to charge; and it would put a defendant to a set of difficult strategic choices as to which prosecutorial claims he would contest. The sentence that would emerge in a case tried under such a system would likely reflect real conduct less completely, less accurately, and less often than did a pre-Guidelines, as well as a Guidelines, trial.

Because plea bargaining inevitably reflects estimates of what would happen at trial, plea bargaining too under such a system would move in the wrong direction. That is to say, in a sentencing system modified by the Court's constitutional requirement, plea bargaining would likely lead to sentences that gave greater weight, not to real conduct, but rather to the skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Compared to pre-Guidelines plea bargaining, plea bargaining of this kind would necessarily move federal sentencing in the direction of diminished, not increased,

uniformity in sentencing. . . .¹⁰⁰

Once again, Justice Breyer's expressed concerns about *Blakely*-ized federal guidelines reflect a particular conception of the existing Guidelines' basic structure and perhaps also an overstated concern about the goal of sentencing uniformity.¹⁰¹ Nevertheless, Justice Breyer rightly spotlights the impact that plea bargaining can have on the operation of any sentencing system that significantly incorporates broader jury trial rights and thus requires traditional sentencing considerations to be pled and proven by prosecutors.¹⁰² More generally, Justice Breyer highlights the basic reality that, in any effort to draft *Blakely*-ized federal guidelines, lawmakers may find it hard to develop a comprehensive and yet simplified scheme for a complex federal system, and may also find it challenging to engineer an effective balance between firm rules and judicial discretion within any such sentencing structure.

C. Political Realities and the Need for Stability

Against the backdrop of the legal and policy considerations surrounding the competing visions for post-*Booker* federal sentencing reform, political and practical realities necessarily must enter into the analysis. Political realities inform the prospects for the leading *Booker* fix proposals; practical realities highlight some additional virtues of the *Booker* advisory guidelines status quo.

Whatever might be the long-term merits of a simplified *Blakely*-ized federal sentencing guideline system, the present-day reality is that none of the central federal sentencing stakeholders—neither members of Congress and Sentencing Commissioners who control the development of system-wide sentencing rules, nor prosecutors and judges who control the

100. United States v. Booker, 125 S. Ct. 738, 760–63 (2005).

101. Justice Breyer's emphasis on the goal of sentencing uniformity throughout the remedial opinion in *Booker* reflects a condition that Professor Marc Miller has recently described as "sentencing equality pathology." See Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271 (2005) (discussing critically the undue and unwise concerns about sentencing uniformity in modern federal sentencing reforms); see also Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 249 (2005) (discussing the harms of Justice Breyer's tendency in *Booker* to "exalt uniformity to the detriment of other important objectives" in his understanding of the goal of federal sentencing reform).

102. See generally Klein, *supra* note 16, at 734–38 (explaining plea bargaining in the federal system after *Booker*); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy* 6–10 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 05-23, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=772884 (discussing the impact of plea bargaining on the operation of the federal sentencing system).

development of case-specific sentencing procedures—seem at all interested in incorporating jury fact-finding into the federal sentencing system.¹⁰³ In her *Blakely* dissent, Justice O'Connor astutely recognized that the jury trial rights recognized by the *Blakely* majority essentially imposed a “substantial constitutional tax” on the operation of a structured sentencing system.¹⁰⁴ Some states have been willing and able to pay this tax, largely because of the relative simplicity and basic structure of their sentencing systems ensures that this tax will be relatively affordable.¹⁰⁵ But none of the players in the federal sentencing system seems willing to accept the costs and complications that incorporating jury fact-finding into the federal sentencing system would entail. Consequently, even if the federal criminal justice system might ultimately be well-served by a move toward a simplified *Blakely*-ized federal sentencing guideline scheme, such a *Booker* fix seems to be a political nonstarter.

But while modern sentencing politics may thwart development of a *Booker* fix in the form of *Blakely*-ized Guidelines, these same politics seem likely to fuel support for a *Booker* fix in the form of topless guidelines. Congress's sentencing work in the years since the passage of the Sentencing Reform Act, especially its continued enactment of harsh mandatory minimum sentencing statutes despite the extensive evidence of their ineffectiveness and unfairness,¹⁰⁶ suggests that

103. Tellingly, in the most recent legislative hearing considering post-*Booker* developments, not a single witness directly advocated creating a significant role for juries within the federal sentencing system. See *Booker* 2006 Hearings, *supra* note 45. The separate testimony presented by the Chair of the U.S. Sentencing Commission, by the Chair of the Criminal Law Committee of the Judicial Conference of the United States, and by a representative of the Department of Justice did not even mention the possibility of a *Booker* fix that would provide an enhanced role for juries in the federal sentencing system. The testimony of a defense practitioner did raise the idea, but primarily as an addendum to his advocacy against Congress moving forward with any other sort of *Booker* fix. See Felman testimony, *supra* note 84.

104. See *Blakely v. Washington*, 124 S. Ct. 2531, 2545–46 (2004) (O'Connor, J., dissenting) (explaining the costs imposed by the majority's decision).

105. See generally Chanenson & Wilhelm, *supra* note 87; see Parent & Frase, *supra* note 87; Reitz, *supra* note 4, at 1108–13 (suggesting that states have embraced *Blakely*-ized Guidelines because jury fact-finding at sentencing “will not have to be used often”).

106. See, e.g., DALE PARENT ET AL., NAT'L INST. OF JUSTICE, KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: MANDATORY SENTENCING 1–3 (1997), available at <http://www.ncjrs.gov/pdffiles/161839.pdf> (discussing findings that indicate the ineffectiveness of mandatory sentencing laws); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 25–31 (1991) (describing the unfairness and ineffectiveness of mandatory minimum sentence provisions); BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 11, 14–27 (1994) (detailing how mandatory sentencing minimums have failed to meet sentencing goals); see also JONATHAN P. CAULKINS ET AL., MANDATORY

many federal politicians are more interested in developing “tough-on-crime” campaign rhetoric than in furthering sound sentencing policies.¹⁰⁷ Moreover, the positions of the Justice Department and the interests of prosecutors have of late come to dominate the political process and legislative outcomes of federal sentencing reform.¹⁰⁸ Consequently, and especially because prosecutors perhaps lost the most power as a result of the *Booker* remedy and perhaps have the most to gain from a topless guideline system, the Justice Department and sympathetic members of Congress are likely to continue to push for some sort of topless guideline response to the *Booker* ruling.¹⁰⁹ Thus,

MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYER'S MONEY? 143–44 (1997) (finding that mandatory minimum drug sentences are not a cost-effective means to reduce drug consumption or drug-related crime).

107. See, e.g., Benson B. Weintraub & Benedict P. Kuehne, *The Feeney Frenzy: A Case Study in Actions and Reactions in the Politics of Sentencing*, 16 FED. SENT'G REP. 114, 114–17 (2003) (describing the political realities that produced the hastily drafted and passed Feeney Amendment); Wendy Kammer, *Federal Offense*, ATLANTIC MONTHLY, June 1994, at 102, 105–06 (explaining how Congress has tried to give the appearance of being tough on crime by enacting mandatory minimum sentences despite the ineffectiveness of such legislation); see also 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, 99–100 (1999) (detailing how “short-term political interests have regularly dominated sound policy-making, as Congress members have rushed to embrace ever-harsher sentencing laws before each election to have ‘get-tough’ rhetoric for their campaigns”); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 40 FED. B. NEWS & J. 158, 158 (1993) (suggesting that when passing mandatory minimum statutes, Congress has been “impulsive, reckless, [and] driven by unquenchable political passions”).

108. Professor Frank Bowman merits credit for making this point most consistently and effectively. See, e.g., Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1336–40 (2005) (explaining how prosecutors and the Justice Department have come to play a central role in the formulation and application of federal sentencing rules); Bowman, *supra* note 69, at 169–74 (same).

109. Interestingly, after a storm of criticism from various quarters about the provisions of section 12 of House Bill 1528, that legislation seemed to stall in the House of Representatives. See generally Letter from Frank O. Bowman, III, Professor of Law, Indiana Univ. Sch. of Law, to Howard Coble, Chairman, House Subcomm. on Crime, Terrorism, and Homeland Sec., & Robert Scott, Ranking Member, House Subcomm. on Crime, Terrorism, and Homeland Sec., in 17 FED. SENT'G REP. 311, 311–14 (2005) (criticizing the provisions of H.R. 1528); Letter from the Judicial Conference of the U.S. to James Sensenbrenner, Jr., Chairman, House Comm. on the Judiciary, in 17 FED. SENT'G REP. 315, 315–18 (2005) (explaining the Judicial Conference's opposition to H.R. 1528); Letter from Thomas W. Hillier, II, Fed. Pub. Defender, to F. James Sensenbrenner, Jr., Chairman, House Judiciary Comm. & John Conyers, Ranking Member, House Judiciary Comm. (Apr. 18, 2005), in 17 FED. SENT'G REP. 319, 319–23 (2005) (expressing strong opposition to H.R. 1528). In addition, the Justice Department's advocacy of a *Booker* fix seemed to abate somewhat after newspaper editorials criticized Attorney General Gonzales's suggestion of creating a minimum guideline system. See, e.g., Editorial, *Judges Must Have Sentence Discretion*, READING EAGLE (Reading, Pa.), June 27, 2005, at A6; Editorial, *No Rush on Sentencing*, WASH. POST, Aug. 8, 2005, at A14; Editorial, *One Size Doesn't Fit All*, DAILY NONPAREIL (Council Bluffs, Iowa), June 23, 2005, at 4A.

political realities suggest that the most likely post-*Booker* choice for members of Congress in the months ahead will be whether to accede to the Justice Department's advocacy of a topless guideline *Booker* fix or to allow the *Booker* advisory guideline system to remain in place.

As suggested in the critical discussion of topless guidelines above,¹¹⁰ faced with a choice between the status quo and moving to a topless guideline system, there are strong reasons for embracing the current *Booker* system of advisory guidelines simply as the lesser of evils. Indeed, in light of the many recent shocks to the federal criminal justice system, the important interests in achieving greater legal stability provides further support for favoring leaving well enough alone. As Professor Frank Bowman has recently observed, "a [sentencing] system in which so much is unsettled and is likely to remain so for years to come is a distraction from the core objectives of criminal justice at best, and is likely to prove a breeding ground for regional disparity and individual unfairness."¹¹¹ This astute and well-stated insight ultimately provides another reason for preferring the current *Booker* remedy over any of the proposed legislative fixes. Despite the challenging and still evolving kinks of transforming a mandatory Guideline system into an advisory one after *Booker*, the remedy engineered by Justice Breyer in *Booker* actually produced remarkable stability in the wake of the Supreme Court's declaration that the Guidelines had been operating in an unconstitutional manner for nearly two decades. As developed in Part II, Justice Breyer's remedial opinion clearly sought to preserve, and so far appears to have succeeded in preserving, the fundamental pre-*Booker* facets and pre-*Booker* roles for everyone involved in the federal sentencing system.¹¹²

The virtues of stability at this moment in the history of

Nevertheless, there is still every reason to believe that at least some members of the Justice Department and Congress would still favor and will keep advocating for some sort of topless guideline *Booker* fix. See Posting of Frank Bowman to Legal Affairs, http://legalaffairs.org/webexclusive/debateclub_sentencing0106.msp (Jan. 20, 2006, 08:05) ("[I]f [the Department of Justice] believes there is a constitutional way to restore the pre-*Booker* status quo, they'll urge Congress to legislate that outcome. Every indication points to the conclusion that the Department favors some form of the 'topless guidelines' proposal . . ."). Indeed, in the most recent legislative hearing about post-*Booker* sentencing developments, Principal Associate Deputy Attorney General William Mercer restated and strongly advocated the Justice Department's interest in a legislative response to the *Booker* ruling in the form of a "minimum guideline system." Mercer testimony, *supra* note 45, at 31–35.

110. See *supra* notes 59–86 and accompanying text.

111. See Posting of Frank Bowman to Legal Affairs, http://legalaffairs.org/webexclusive/debateclub_sentencing0106.msp (Jan. 19, 2006, 08:50).

112. See *supra* notes 16–26 and accompanying text.

federal sentencing reform should not be underappreciated. The last three years—starting with the enactment of the PROTECT Act in April 2003, through the *Blakely* ruling in June 2004 and the *Booker* ruling in January 2005—have been a period of extraordinary turmoil and uncertainty in the federal sentencing system. So far, it does not yet appear that these remarkable transitions have had a major impact on the federal criminal justice system's ability to fight crime. But it is clear that all the constitutional uncertainty and legal turmoil has exacted a toll on participants in the federal criminal justice system. All of the case-level sentencing decisionmakers—judges, prosecutors, defense attorneys, and probation officers—have been forced to spend considerable time sorting through an ever-changing sentencing landscape.¹¹³ Such turbulence not only produces a significant drain on the entire federal criminal justice system, but it also undermines the congressional goals of predictability and uniformity in sentencing. A range of tangible and intangible harms could flow from continued instability and uncertainty in the federal criminal justice system; policymakers should be fully aware and acutely concerned that any and every proposal for making major changes to the federal sentencing structure in the wake of *Booker* threatens continued instability and uncertainty.

Further, the argument in favor of the current post-*Booker* status quo extends beyond the claim that the current *Booker* system of advisory guidelines is just the lesser of evils. As developed in Part II, not only has the *Booker* remedy helped create a needed stability in the federal sentencing system, it also appears to have forged some marginal improvements by making federal sentencing decisionmaking more balanced, transparent, and proportional as compared to the pre-*Booker* system.¹¹⁴ Moreover, and perhaps even more importantly, the *Booker* remedy should be appreciated for its long-term potential. Justice Breyer's remedial opinion, by emphasizing the provisions of § 3553(a) and essentially demanding a sentencing process focused on the exercise of reasoned judgment by federal judges,¹¹⁵ creates by judicial fiat a system of sentencing that looks a lot

113. See *Legal Decisions*, *supra* note 57 (noting increases in filings and appeals attributable to *Blakely* and *Booker*).

114. See *supra* notes 39–44 and accompanying text (describing *Booker*'s positive effects on federal sentencing).

115. See Berman, *Conceptualizing Booker*, *supra* note 3 (manuscript at 28–31, on file with author) (arguing that the two opinions in *Booker* can be conceptually harmonized around the idea that judges should be exercising reasoned judgment at sentencing and explaining how the *Booker* remedy essentially requires both district and appellate judges to exercise reasoned judgment in their sentencing work).

more like the idealized guideline system that early advocates of guideline reform sought by creating the possibility of developing a purpose-driven “common law of sentencing.”¹¹⁶ *Booker* requires district and appellate courts to focus on the provisions of § 3553(a), which means that judges now can and must give more sustained attention to the broader goals of sentencing reform that Congress incorporated into the Sentencing Reform Act. In addition, the transformation of the guidelines from mandates into advice provides the Commission with a remarkable new opportunity and impetus to improve and simplify key facets of the guideline system.

Of course, *Booker*'s potential will be wasted if judges and the Commission continue to cling to the existing guidelines like a security blanket. It seems that some judges and members of the Commission, perhaps all too aware of Congress's recent sentencing reform track record,¹¹⁷ are still embracing and even extolling the current guidelines out of fear that Congress might overreact to any efforts to bring more institutional balance and fundamental humanity to federal sentencing decisionmaking.

But, rather than be stifled by such an understandable but unhealthy fear, federal judges and the Commission should seize this unique post-*Booker* moment as an opportunity to begin incrementally developing a more fair and effective federal sentencing system. Rather than fear Congressional overreaction, judges and the Commission should trust lawmakers to respond positively to thoughtful and reasoned explanations of how federal sentencing can and should be improved. The next Part suggests some possibilities for how the *Booker* remedy could and should be further tweaked to serve the interests of sound sentencing policy and practice in the federal criminal justice system.

IV. PLAYING THE *BOOKER* HAND: THE WHO AND HOW OF EFFECTIVE TWEAKING

Though perhaps preferable to leading alternatives, the sentencing system *Booker* produced is hardly perfect; some modifications are essential for advisory guidelines to work

116. Berman, *supra* note 107, at 96 (citations omitted) (discussing sentencing reformers' vision of the judiciary having particular institutional advantages for sentencing lawmaking which counseled judges' inclusion in the development of a guideline model that fostered the development of a common law of sentencing); see also Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 30–36 (2000) (same).

117. See *supra* notes 103–109 and accompanying text.

effectively in the federal system.¹¹⁸ The sentencing system created by *Booker* needs to be and should be tweaked. This Part concludes by outlining key players and considerations for tweaking *Booker*.

A. *Who Should Tweak Booker*

Though Justice Breyer respectfully noted in the *Booker* opinion that the federal sentencing ball now lies in Congress's court, his own professional history likely would lead him to encourage the Sentencing Commission to get into the game. Advocates of modern sentencing reform long ago highlighted why legislatures were probably not the ideal institution for developing all the particulars of a structured sentencing system.¹¹⁹ The very concept of a sentencing commission grew out of the realization that neither the judiciary nor legislatures had been able to, nor could really be expected to, engender effective and comprehensive sentencing reforms. Early advocates of sentencing reforms reasoned that a permanent commission—comprised of knowledgeable experts who are insulated from short-term political pressures and have the time and opportunity to study sentencing—would be “institutionally well-suited” to develop detailed sentencing law.¹²⁰ Modern sentencing reform experiences

118. Some federal district judges have described the *Booker* remedy to be “as close to ideal as we’re likely to get.” Lynn Adelman & Jon Deitrich, *Judgment on Booker?*, LEGAL TIMES, Jan. 16, 2006, at 46; see also Carr, *supra* note 27, at 295–96 (setting forth a dozen reasons to support the *Booker* remedy). This reaction is not surprising because federal district judges seem to be the biggest beneficiaries of the conversion of the Guidelines from mandates to advice. Notably, district judges seem to be the only knowledgeable observers who have suggested that the *Booker* remedy is the best of all possible federal sentencing worlds.

119. See, e.g., MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 119 (1973) (noting that, in the area of sentencing reform, “legislative action tends to be sporadic and impassioned, responding in haste to momentary crises, lapsing then into the accustomed state of inattention”); Michael H. Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315, 323–24 (1979) (discussing why “Congress is ill-equipped and institutionally unsuited” to develop effective sentencing guidelines); cf. PIERCE O’DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 33–34 (1977) (asserting that “Congress, as the most representative branch of government, must assume the initial and major leadership role” in sentencing, but also calling for the creation of a federal sentencing commission); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 3–6 (1976) [hereinafter FAIR AND CERTAIN PUNISHMENT] (calling for the development of a sentencing commission to help develop structured sentencing reforms).

120. Berman, *supra* note 107, at 96; see, e.g., FAIR AND CERTAIN PUNISHMENT, *supra* note 119, at 25–26; FRANKEL, *supra* note 119, at 118–23 (proposing a “Commission on Sentencing” designed to draw from and elicit the ideas of experienced professionals to study sentencing and formulate laws and rules under the supervision of Congress); O’DONNELL ET AL., *supra* note 119, at 74 (amending their proposal to have the political branches appoint members to the Commission and proposing instead appointment of

have tended to confirm that sentencing commissions are the best frontline developers of sentencing law, especially when they have adequate resources and use data to rationally inform proposed sentencing reforms.¹²¹ Put simply, as an administrative body able to study the workings of the criminal justice system as a whole, and also able to craft, implement, monitor and adjust multifaceted system-wide sentencing rules, sentencing commissions are uniquely positioned to assess and remedy in a coordinated fashion the complex policy and practical issues in the administration of a sentencing system.¹²²

Of course, as detailed by many commentators, the U.S. Sentencing Commission has never quite lived up to reformers' ideal of an expert sentencing agency.¹²³ Historically, the Commission has unduly concentrated its efforts on reducing

members by the judiciary); Kevin R. Reitz & Curtis R. Reitz, *Building a Sentencing Reform Agenda: The ABA's New Sentencing Standards*, 78 JUDICATURE 189, 191 (1995) (calling for permanent agencies to work in between courts and the legislature, playing a collaborative role with both branches and developing expertise the legislature does not have to formulate a system "rather than [] a series of ad hoc decisions"); Tonry, *supra* note 119, at 323–24 (proposing a "politically insulated, independent commission with rulemaking authority, subject to statutory criteria and limits").

121. Chanenson & Wilhelm, *supra* note 87, at 4; see also Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 750–52 (2005) (discussing the potential problems with political sentencing decisions based on misleading media coverage). Significantly, the American Law Institute, as part of its major revisions to the sentencing provisions of the Model Penal Code, has developed a draft reform plan that heavily emphasizes the importance of creating and empowering the Commission to have a leading role in sentencing reforms. See Model Penal Code: Sentencing (Kevin Reitz, Revised Draft 2006).

122. See Model Penal Code: Sentencing (Kevin Reitz, Revised Draft 2006); Barkow, *supra* note 121, at 811–12 (noting that sentencing commissions are especially "well positioned to consider the aggregate effects of all sentencing laws and to make sure that the specific sentencing decisions add up to an overall, sensible policy"); Barry L. Johnson, *The Role of the United States Sentencing Commission in the Reform of Sentencing Procedures*, 12 FED. SENT'G REP. 229, 230–31 (2000) ("[T]he Commission may be the institution best situated . . . to evaluate what reforms, if any, best serve the underlying purposes of sentencing."); cf. Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1380–86 (1999) (stressing the importance of a coordinated approach to sentencing and highlighting the inability of judges to effectively coordinate sentencing reforms).

123. See, e.g., Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 218 (2005) ("From its inception, the United States Sentencing Commission has provided neither guidance nor advice."); see also STITH & CABRANES, *supra* note 23, at 5 (quoting Senator Kennedy's Chief Counsel, who said that the Commission had become "[d]espised by judges, sneered at by scholars, ignored by the Justice Department, its guidelines circumvented by practitioners and routinely lambasted in the press."); Barkow, *supra* note 121, at 757 (calling the Commission "ineffectual"); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 4 (1991) (describing the Commission's "sputtering start"). See generally *The Sentencing Commission and Its Critics*, 2 FED. SENT'G REP. 210 (1990).

system-wide sentencing disparity,¹²⁴ has paid insufficient attention to case-specific sentencing justice, and has shown a disconcerting tendency to subordinate its sentencing judgments to Congress's more punitive tendencies rather than provide an independent voice and perspective on sentencing policy.¹²⁵

Nevertheless, despite a less than inspiring track record, *Booker* provides a new opportunity for the Commission to deliver on its promise. Indeed, the Commission necessarily has a critical role and unique responsibilities in the analysis and development of the federal sentencing system in the wake of *Booker*. The Commission is the only institution that, by virtue of its information and perspective, can take a truly comprehensive and balanced view of the entire post-*Booker* federal sentencing landscape. The remarkable remedy that the Supreme Court devised in *Booker* could present a remarkable opportunity for both federal district and appellate judges to develop a frequently discussed, but historically elusive, common law of sentencing. But only the Commission will be able to examine and assess the development of this common law with an eye on cumulative sentencing data to determine whether the central goals of federal sentencing reform are being effectively served in the operation of an advisory guideline system.

To its credit, in the wake of *Booker*, the Commission has adjusted some of its practices and has been taking a somewhat more active role in the public dialogue over the current state and the future direction of federal sentencing. Of particular note and value, the Commission has disseminated "real-time" post-*Booker* sentencing data: nearly every month since the *Booker* ruling, the

124. See Ilene H. Nagel, Foreword, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 934 (1990) (explaining that, in formulating the Guidelines, the Commission's "emphasis was more on making sentences alike"); see also Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 632-33 (1992) ("[T]he way that the Sentencing Commission read its statute and defined its task . . . made uniformity the key objective of the guidelines.").

125. See Julie Stewart, Families Against Mandatory Minimums, testimony to the U.S. Sentencing Commission (Mar. 18, 1997), reprinted in 9 FED. SENT'G REP. 317, 318 (1997) (lamenting the fact that the Commission has "let Congress kick [it] around"); Deanell Reece Tacha, *Serving This Time: Examining the Federal Sentencing Guidelines After a Decade of Experience*, 62 MO. L. REV. 471, 479 (1997) (criticizing the Commission for "primarily responding to specific, ad hoc concerns of Congress" instead of being "more proactive in setting its own agenda"); see also Albert W. Alschuler, *Willie and Bill*, 5 FED. SENT'G REP. 214, 215 (1993) (noting the Commission's tendency to follow Congress's direction of sentencing policy and then blame Congress for criticisms of the Guidelines). For a complete transcript of the 1997 hearings, see U.S. Sentencing Comm'n, Public Hearing on Proposed Guideline Amendments (Mar. 18, 1997), available at <http://www.ussc.gov/minutes/hring397.pdf>.

Commission has released up-to-date information on post-*Booker* sentences¹²⁶ in an effort to ensure that cumulative sentencing data play an integral and effective role in the debate over whether and how Congress should respond to *Booker*. In addition, in March 2006, the Sentencing Commission released a massive report, simply entitled *Report on the Impact of United States v. Booker on Federal Sentencing*, which presented a lot of data and intricate analysis of sentencing outcomes in the lower federal courts in the year following the *Booker* decision.¹²⁷

However, to effectively manage the post-*Booker* universe, the Commission must go far beyond just assembling and analyzing basic post-*Booker* sentencing data—it should be setting forth policy advice and specific recommendations that directly explore and explicitly assess the pros and cons of various potential short-term and long-term legislative responses to *Booker*. The Commission's March 2006 report on *Booker's* impact was impressive for its copious data analysis, but it conspicuously avoided making any policy assessments of the current state and likely development of post-*Booker* federal sentencing. The conclusion of this *Booker* report suggests that the Commission may believe its principal responsibility is to “inform careful consideration of the evolving post-*Booker* federal sentencing system.”¹²⁸ But, to truly fulfill its mission and mandates, the Sentencing Commission must recommend and guide, as well as inform: only by going far beyond the dissemination of basic data can the Commission effectively help frame and shape the sound development of the post-*Booker* world.

Disappointingly, the Commission has so far been notably reluctant to advance any proposals or specific reforms to address directly or indirectly the state of federal sentencing after *Booker*. The March 2006 *Booker* report runs 277 pages, but never sets forth any broad policy assessments or discrete reform recommendations concerning post-*Booker* sentencing in the federal courts or possible post-*Booker* responses by Congress. Perhaps even more disconcerting, in January 2006, the Commission released a long list of new proposed Guideline amendments that remarkably does not even once mention the *Booker* ruling, let alone speak in any way to how guideline sentencing could or should develop in *Booker's* wake.¹²⁹ Among

126. U.S. Sentencing Comm'n, *Booker and Fanfan Materials*, <http://www.ussc.gov/bf.htm> (last visited Apr. 22, 2006).

127. See USSC *Booker Report*, *supra* note 31.

128. *Id.* at 143.

129. See Sentencing Guidelines for United States Courts, 71 Fed. Reg. 4782, 4782–83

other notable omissions, the Commission's proposed amendments do not address directly or even indirectly critical guideline "hot spots" that have divided lower courts after *Booker* (like the application of the crack guidelines or the use of acquitted conduct in guideline calculations). Moreover, continuing the disconcerting severity patterns of the past, it appears that nearly every significant new amendment put forth by the Commission proposes an increase in applicable guideline ranges. These amendments suggest the Commission continues to run scared from suggestions made by many sentencing participants and observers to bring more institutional balance and fundamental humanity to the federal sentencing process. The Commission apparently believes that avoiding any serious discussion of possible responses to *Booker* is its best course of action. But for the Commission to proceed with a "business as usual" guideline amendment without even mentioning *Booker* is a dereliction in duty; it also all but ensures the Commission's irrelevancy in post-*Booker* developments and debate.¹³⁰

B. *How to Tweak Booker*

Though the Commission has so far failed to seize a leadership role in the post-*Booker* world, the Commission certainly could and should help Congress and the courts become collaborative partners in the fair development of an advisory guideline system. Indeed, the Commission could and should facilitate the active involvement of a broad array of sentencing actors and institutions, and aspire to be a true hub of sentencing information and knowledge, by encouraging various entities—including public policy groups, federal agencies such as the Department of Justice, and state institutions such as state

(Jan. 27, 2006) (notice of proposed amendments); *see also* Douglas A. Berman, Sentencing Law and Policy WebLog, http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/a_loud_deafenin.html (Jan. 26, 2006, 11:03 EST) (A loud deafening silence from the Sentencing Commission).

130. See Douglas A. Berman, Sentencing Law and Policy WebLog, http://sentencing.typepad.com/sentencing_law_and_policy/2006/02/friday_afternoon.html (Feb. 3, 2006, 18:28 EST) (Friday Afternoon Ranting About the Post-*Booker* World), for a reprinting of this telling comment from a federal sentencing practitioner following the Commission's release of its 2006 proposed Guideline amendments:

[T]he Sentencing Commission should be de-funded and abolished. What would the public's reaction be if the director of FEMA issued the agency's annual report without mention of Katrina? I find that equivalent to the Commission issuing what amounts to its State of the Union paper without mention of a case that rocks the universe of federal sentencing and should have everything to do with the Commission's current mission.

Id.

sentencing commissions—to share and disseminate data concerning the operation of federal and state sentencing systems. And, especially because judges necessarily play the most critical role in the application of general sentencing laws to specific cases and because it is essential that judges can respect and consider sound the sentencing laws they are called upon to apply, the Commission certainly should take proactive steps to ensure judges can effectively participate in the post-*Booker* policy process.

Were the Commission to approach its post-*Booker* responsibilities proactively, it would not be too difficult to identify some broad consensus themes for ways to effectively tweak *Booker*. Though a comprehensive account of potentially valuable federal sentencing reform is far beyond the scope of this Article,¹³¹ below I outline some obvious areas for attention and emphasis by the Commission and others as the post-*Booker* world of advisory federal sentencing guidelines continues to unfold.

1. Emphasis on Repeat and Violent Offenders. In the wake of *Blakely* and *Booker*, various statements from Department of Justice officials have sensibly suggested that the toughest federal sentences should be directed toward violent and repeat offenders.¹³² Similarly, Attorney General Alberto Gonzales, during his confirmation hearings in January 2005, asserted that prison is best suited “for people who commit violent crimes and are career criminals,” and he also stressed that a focus on rehabilitation for “first-time, maybe sometimes second-time offenders . . . is not only smart, . . . it’s the right thing to do.”¹³³ In Attorney General Gonzales’ words, “it is part of a compassionate

131. Both before and since the Supreme Court’s modern sentencing jurisprudence raised new questions about the soundness of the federal sentencing system, many books, symposia, and articles have been devoted to setting forth recommendations for the improvement of the federal sentencing system. See, e.g., *A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform*, 58 STAN. L. REV. 1 (2005); sources cited *supra* note 85. In addition, this entire issue of the *Houston Law Review* addresses post-*Booker* sentencing jurisprudence in ways that highlight consensus themes for improving federal sentencing.

132. See Wray Testimony, *supra* note 45, at 8, 10 (stressing that most federal prisoners “are in prison for violent crimes or had a prior criminal record before being incarcerated” in response to the criticism that “our prisons are filled with non-violent first-time offenders”); see also Dan Bryant, Letter to the Editor, *Violent or Recidivist Prisoners*, WASH. POST, Dec. 18, 2005, at A25 (asserting that “[t]ough sentencing makes Americans safer by locking up repeat and violent offenders”).

133. *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 12, 101 (2005) (statement of Alberto R. Gonzales, Nominee to be U.S. Attorney General).

society to give someone another chance.”¹³⁴

Yet, some recent analyses suggest the federal system could do a better job focusing prison resources on violent and repeat offenders. According to a report from the Sentencing Project, over one-third of the federal prison population is comprised of first-time, non-violent offenders, and nearly three-fourths of this population are non-violent offenders with no history of violence.¹³⁵ Interestingly, and perhaps unsurprisingly, the Commission’s March 2006 *Booker* report suggests in various ways that first-offenders and non-violent offenders may be receiving more below-guideline sentences after *Booker*.¹³⁶

Collectively, the comments from Justice Department officials and related federal sentencing realities suggest that there is broad agreement that the federal sentencing system should be particularly concerned with violent and repeat offenders. The Commission, as well as Congress, the Justice Department, and the courts, should ensure that post-*Booker* analyses and substantive reforms are especially attentive to the distinctions between first-time, non-violent offenders and repeat, violent offenders.

2. Role for Offender Circumstances. Crude mandatory sentencing laws and rigid offense-oriented guidelines can often prove ineffectual and unjust because, by mandating a sentence based only on certain aspects of an offense, they often require identical sentences for defendants who are substantially different.¹³⁷ The existing guidelines, because of the very limited role given to a range of mitigating offender characteristics, have been justifiably criticized for sometimes placing undue emphasis on precise quantities of harm while giving insufficient attention to offender circumstances.¹³⁸ Notably, in a pre-*Booker* survey of

134. *Id.*

135. See The Sentencing Project, *The Federal Prison Population: A Statistical Analysis*, available at <http://www.sentencingproject.org/pdfs/federalprison.pdf> (providing “an overview of the current federal prison population and sentencing trends of recent years”).

136. See USSC *Booker* Report, *supra* note 31, at x (“The rate of imposition of below-range sentences for first offenders increased after *Booker*.”); *id.* at ix (“The majority of below-range sentences in cases involving criminal sexual abuse are imposed for offenders with little or no criminal history.”); see also *id.* at x (noting that “[t]he majority of the cases in which below-range sentences are being imposed for career offenders are drug trafficking cases,” which are often offenses that may involve neither violence nor serious threats of violence).

137. See generally sources cited *supra* note 106 (setting forth numerous reasons why crude mandatory sentencing laws are often ineffective and unjust in operation).

138. See Douglas A. Berman, *Distinguishing Offense Conduct and Offender*

Article III judges conducted by the Commission, a significant percentage of judges suggested that more emphasis be given to a broad array of mitigating offender circumstances, and a majority of respondents stated that age, mental condition, and family ties and responsibilities should play a greater role in federal sentencing.¹³⁹ And, unsurprisingly, many federal district judges have utilized the new discretion they possess under the current advisory Guidelines system to give greater attention to offender characteristics at sentencing.¹⁴⁰

These realities should lead the Commission, through its data collection and analysis, to seize the opportunity presented by *Booker* to reexamine how offender circumstances can and should be incorporated into federal guideline sentencing. Though there have long been theoretical and practical debates over the proper role of offender circumstances at sentencing,¹⁴¹ the *Booker* remedy has led some federal judges to give much greater emphasis to offender characteristics, whereas other federal judges have been content to look only to Guideline provisions at sentencing.¹⁴² The Commission cannot expect to discover the perfect solution to how to best incorporate offender circumstances in federal sentencing. But it also cannot and should not simply hope this critical issue will go away if it is not directly addressed.

Characteristics in Modern Sentencing Reforms, 58 STAN. L. REV. 277, 281–85 (2005) (describing federal sentencing reforms and their tendency to focus on offense conduct while deemphasizing offender characteristics).

139. U.S. SENTENCING COMM'N, SUMMARY REPORT: SURVEY OF ARTICLE III JUDGES 3 (Dec. 2002).

140. See, e.g., *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243, at *1–3 (E.D. Tenn. May 6, 2005) (incorporating a consideration of family history into the opinion); *United States v. Person*, 377 F. Supp. 2d 308, 314–15 (D. Mass. 2005); *United States v. Moreland*, 366 F. Supp. 2d 416, 419–20 (S.D.W. Va. 2005); *United States v. Cherry*, 366 F. Supp. 2d 372, 376–79 (E.D. Va. 2005); *United States v. Marinaro*, No. CR-03-80-B-W, 2005 WL 851334, at *4–6 (D. Me. Apr. 13, 2005); *United States v. Carmona-Rodriguez*, No. 04-CR-667RWS, 2005 WL 840464, at *3–5 (S.D.N.Y. Apr. 11, 2005); *Simon v. United States*, 361 F. Supp. 2d 35, 40–43 (E.D.N.Y. 2005); *United States v. Carvajal*, No. 04 CR 222AKH, 2005 WL 476125, at *1 (S.D.N.Y. Feb. 22, 2005); *United States v. Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073, at *3 (N.D. Ind. Feb. 3, 2005); *United States v. Ranum*, 353 F. Supp. 2d 984, 990–91 (E.D. Wis. 2005).

141. See generally NORA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 324–52 (2004) (discussing debates over the role of offenders' background at sentencing); Berman, *supra* note 138, at 277–81 (reviewing interplay of theoretical consideration at sentencing and the role of offender circumstances).

142. Compare *United States v. Ranum*, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005) (stating that, after *Booker*, judges must carefully consider a range of offender-related factors and “sentence the person before them as an individual”), with *United States v. Wilson*, 350 F. Supp. 2d 910, 914 (D. Utah 2005) (contending that, even after *Booker*, in “all but the most unusual cases, the appropriate sentence will be the Guidelines sentence.”).

3. *Balanced Pursuit of Uniformity.* Achieving greater sentencing uniformity was an important goal of the Sentencing Reform Act of 1984, but it was not the only goal. Indeed, the *Booker* Court's emphasis on all the provisions of § 3553(a) is a stark reminder that Congress, in its statutory instructions to judges, listed "the need to avoid unwarranted sentence disparities"¹⁴³ as only one of seven distinct sentencing considerations.¹⁴⁴ Moreover, both the *Blakely* and *Booker* decisions can and should be read as a statement by the Supreme Court that a range of values—such as our society's commitment to fair procedures and adversarial justice—need to be balanced with and integrated into a modern quest for sentencing uniformity.

Furthermore, the Commission's recent Fifteen-Year Report on the operations of the Guidelines documents that the federal sentencing system has always reflected some geographic variations and that there are significant limits on the ability of sentencing rules to control disparity arising at presentencing stages due to charging choices made by prosecutors and plea bargaining choices made by prosecutors and defendants.¹⁴⁵ More generally, the research of both the Commission and many others have highlighted that sentences which are uniformly too harsh and too complicated may do great violence to the goals of the Sentencing Reform Act and its mandate in § 3553(a) that courts impose sentences "sufficient, but not greater than necessary, to comply with the purposes set forth" in the Act.¹⁴⁶

In short, absolute sentencing uniformity is not an achievable goal, nor should it be a goal doggedly pursued without recognizing a just sentencing system should also strive to be humane and respectful to all persons it impacts. And yet, as Justice Department officials have regularly stressed, the increased judicial discretion resulting from the *Booker* advisory guideline remedy necessarily increases the potential for greater sentencing disparity in the federal sentencing system. The enduring challenge not only for the Commission, but ultimately for all the persons and institutions involved in the federal sentencing system, is to develop sound post-*Booker* rules and reforms that can sensibly balance the important goal of sentencing uniformity with the other important goals that are inherent in any effort to produce a fair and effective sentencing

143. 18 U.S.C. § 3553(a)(6) (2000).

144. § 3553(a).

145. See U.S. SENTENCING COMMISSION, *supra* note 58, Executive Summary.

146. § 3553(a).

system.

4. *The Key Link Between Procedure and Substance.* The nature of post-*Booker* discussions of federal sentencing law and policy make it surprisingly easy to forget that *Blakely* and *Booker* are fundamentally cases about sentencing procedures. Ultimately, these cases and the reactions they have engendered serve as a critical lesson in the inextricable link between the substance and the procedures of modern sentencing reforms. However, Congress and the Commission have historically given relatively little attention to fundamental procedural issues that arise in sentencing—issues such as notice to parties, burdens of proof, appropriate fact-finders, evidentiary rules and hearing processes—even though these procedural matters play a central role in the actual application of general sentencing rules to specific cases. In another article I have urged the Commission to take an active role in developing the procedural reforms that seem necessary to achieve the substantive goals of modern sentencing reforms,¹⁴⁷ and I continue to believe the Commission is uniquely well-suited to the task of establishing sound and uniform sentencing procedures.

In particular, in taking up the task of reexamining federal sentencing procedures, the Commission should closely examine persistent complaints that the guidelines sentencing process fails to provide defendants fair notice and lacks transparency concerning the facts and factors which can impact a defendant's sentence.¹⁴⁸ Defendants often must make critical plea decisions with incomplete information as to likely guideline sentencing outcomes, and not infrequently, after the entry of a plea, probation officers will discover facts not contemplated or even known to the parties that can significantly impact a defendant's sentencing exposure. The Commission should explore the development of procedural mechanisms which can improve the notice defendants receive concerning guideline sentencing determinations and which would more generally enhance the transparency of presentencing charging and plea bargaining

147. See Douglas A. Berman, *Appreciating Apprendi: Developing Sentencing Procedures in the Shadow of the Constitution*, 37 CRIM L. BULL. 627, 645–59 (2001) (discussing why it is critical for sentencing commissions “to start placing sentencing procedures high on their reform agendas”).

148. See, e.g., James Felman, *The Need for Procedural Reform in Federal Criminal Cases*, 17 FED. SENT'G REP. 261 (2005) (stressing the importance of procedural reforms beyond those emphasized by *Blakely* and *Booker*); see also Berman, *Pondering Process*, *supra* note 3, at 679–81 (stressing importance of a range of procedural issues at sentencing).

decisions.¹⁴⁹

In addition, in the wake of *Booker*, defense lawyers have started arguing that beyond a reasonable doubt—and not preponderance of the evidence—should be the applicable standard of proof for disputed facts at federal sentencing.¹⁵⁰ I see significant merit in the contention that the Constitution’s Due Process Clause should be understood to require that facts that can lead to enhanced sentence be established beyond a reasonable doubt. After all, the Supreme Court stressed in *In re Winship* that this heightened proof 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.’”¹⁵¹

Moreover, even if a lesser burden of proof may still be constitutionally permissible at sentencing after *Booker*, the fundamental principles articulated by the Supreme Court in *Apprendi*, *Blakely*, and *Booker* suggest that, as a matter of policy, it is not fair or just to apply a civil standard of proof when resolving factual issues in a criminal case that can have defined and potentially severe punishment consequences for a defendant.

Notably, the Sentencing Reform Act does not speak to the burden of proof issue at all. And though the commentary to Guidelines’ § 6A1.3 states that the Commission “believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns”¹⁵² in resolving factual disputes, this provision is overdue for reexamination in the wake of the Supreme Court’s decisions in *Apprendi*, *Blakely*, and *Booker*. Justice Breyer writing for the Court in *Booker* and many others have understandably spotlighted the administrative challenges and potentially harmful consequences of forcing prosecutors to plead and prove all aggravating “guideline facts” to a jury,¹⁵³ but nothing in the

149. See Felman, *supra* note 148, at 261–62 (emphasizing notice and transparency issues).

150. See, e.g., Alan DuBois & Anne E. Blanchard, *Sentencing Due Process: How Courts Can Use Their Discretion to Make Sentencings More Accurate and Trustworthy*, 18 FED. SENT’G REP. 84, 89–90 (2005) (detailing arguments for application of beyond a reasonable doubt standard of proof at sentencing); Defender letter, *supra* note 55, at 21 (arguing for a heightened standard of proof in federal sentencing determinations); see also Williams testimony, *supra* note 55, at 3 (urging that the “Commission should aggressively pursue improved procedural fairness at sentencing . . . [especially] concerning the standard of proof”).

151. *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

152. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3, cmt. (2005).

153. See, e.g., *United States v. Booker*, 125 S. Ct. 738, 761–62 (2005).

Booker decision provides a compelling conceptual justification for allowing aggravating guideline facts which can significantly enhance sentences to be proven only by the civil standard of preponderance of the evidence.

The Commission should give steady attention to courts' post-*Booker* approaches to a range of procedural and burden-of-proof issues at sentencing, and it should reexamine the policy statements and commentary in the Guidelines in light of recent Supreme Court and lower court jurisprudence and broader public policy concerns. Once again, the Commission cannot nor should not expect to discover the perfect balance in fairness and efficiency when developing revised procedural rules for the federal sentencing system, but the Commission also cannot nor should not simply hope these critical procedural concerns will go away if they are not directly addressed.

V. CONCLUSION

Any significant and far-reaching legislative *Booker* fix would further disrupt a federal sentencing system that is still adjusting to the considerable turmoil and uncertainty resulting from the Supreme Court's *Blakely* and *Booker* rulings. Because the current post-*Booker* federal sentencing world is not so obviously broken, perhaps the old adage counsels against any dramatic fix-it effort. Instead, policy makers in Congress and the Commission should appreciate that, at least in the short term, a program of careful study and cautious consideration of modulated incremental changes, if any changes are deemed needed at all, is likely to provide the soundest course for the post-*Booker* development of the federal sentencing system.

Despite a less than inspiring track record, the Commission must appreciate and embrace the fact that *Booker* provides a new and critical opportunity for the Commission to deliver on its promise as the key institution for leading the development of fair and effective sentencing system. The Commission must no longer cling to the existing guidelines like a security blanket nor operate in fear of the possibility that Congress might overreact to any efforts to bring more institutional balance and fundamental humanity to federal sentencing decisionmaking. Rather than be stifled by such fears, the Commission should seize this unique post-*Booker* moment as an opportunity to begin incrementally developing a more fair and effective federal sentencing system. The Commission should trust lawmakers to respond positively to thoughtful and reasoned explanations of how federal sentencing can and should be improved, and the Commission should seek to tweak the *Booker* remedy to

2006]

TWEAKING BOOKER

389

better serve the interests of sound sentencing policy and practice in the federal criminal justice system.