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Fulfilling Booker's Promise

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Fulfilling *Booker*'s Promise

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By making the federal sentencing guidelines advisory instead of mandatory, *United States v. Booker*[1] marked a welcome end to a sad chapter in American law. Although enacted with good intentions, the United States Sentencing Guidelines constituted "one of the great failures at law reform in U.S. history."[2] No code, no matter how comprehensive, can identify all of the factors that should affect a sentence, and in creating the guidelines, the United States Sentencing Commission ignored many such factors. Further, by making the code mandatory, Congress and the Commission prevented courts from imposing just sentences in many cases. After *Booker*, judges need no longer impose sentences that they do not believe in. *Booker* restored to judges a meaningful role in sentencing and enabled them to craft sentences appropriate to the circumstances of a case. At the same time, by leaving the guidelines intact but making them advisory, *Booker* provided an objective marker against which to measure a sentence. As one observer recently put it; "in its own strange, two-part way, *Booker* gets us to a good result. It may lead us as close to an ideal system as we may ever get – rules moderated by mercy."[3]

In this Article, we focus on the new system's promise for achieving more just sentencing results. In keeping with the

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1. 125 S. Ct. 738 (2005).

2. Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 726 (1999).

3. Robb London, *Aftermath*, SUMMER 2005 HARV. L. BULLETIN 6 (quoting William Stuntz).

subject of the present symposium - sentencing rhetoric - we begin by describing the peculiar rhetoric that characterized sentencing under the mandatory guidelines and contrast it with the richer and more meaningful discourse that *Booker* makes possible. We then outline a procedure for sentencing post-*Booker*, discuss the role of the guidelines in the new system, and offer examples of how a variety of factors can affect sentencing decisions. We conclude with a brief discussion of the issue of sentencing disparity.

I. PRE- AND POST- *BOOKER* SENTENCING RHETORIC

A member of the public who attended a sentencing proceeding under the mandatory guideline regime might reasonably have wondered if she had come to the right place. Although a judge and counsel were present, they conversed in an unintelligible language. They did not discuss the defendant's moral culpability, the reason that he offended, his character and background, the likelihood that he would re-offend, the effect on the victim, or the need to protect the public. Rather, the judge and lawyers talked about offense levels and criminal history scores; about "intended" versus "actual" loss amounts; about the weight of drugs that it was reasonably foreseeable the defendant's confederates would possess; about whether the scheme was "sophisticated" or merely involved "more than minimal planning." The proceeding was sterile, the lawyers' arguments and the defendant's allocution largely irrelevant, and the sentence preordained. As two commentators described it:

> [A]fter thirty or forty minutes of discussion in this double-speak, the sentencing judge realizes that parties and spectators in the courtroom are staring ahead in dazed numbness, having lost all sense of what is happening. That is when the judge feels bound to pause, to try to reassure courtroom observers, in comprehensible language, that the principal interlocutors in the courtroom do indeed understand what they are talking about, and that what is going on, though perhaps unintelligible to them, is indeed honest and fair. This is sometimes an awkward and embarrassing moment for the judge, who must try to explain a proceeding that may

> appear as arbitrary to the judge as it does to observers in the courtroom.
>
> The observer who comes to the contemporary federal courtroom to witness the dramatic passing of judgment on a member of the community – to observe the drama of catharsis, appeals for mercy, appeals for severity, and the reasoned judgment that takes all of this into account – is sorely disappointed. That observer finds in today's federal courtroom precious little discussion of the human qualities of the victim or the defendant, of the inherently unquantifiable moral aspects of the defendant's crime, or of the type of sanction that would best achieve any of the purposes of sentencing. The "purpose" of sentencing in the new regime, he will learn, is nothing more and nothing less than compliance with the Sentencing Guidelines.[4]

Booker makes possible a more meaningful sentencing proceeding. Although judges and lawyers must still discuss and resolve guideline disputes, they need no longer limit themselves to these often arcane issues. In the post-*Booker* world, 18 U.S.C. § 3553(a), not the guidelines, governs sentencing, and it directs courts to consider traditional sentencing factors such as the specific circumstances of the case, the character of the defendant, and the need for the sentence to reflect the seriousness of the offense and to protect the public. By returning such traditional factors to prominence in sentencing, *Booker* enables judges and lawyers to engage in a dialogue that will not frustrate the participants or the public but rather satisfy their deepest intuitions about what sentencing should involve. Equally important, after *Booker*, a lawyer's arguments and a defendant's allocution are no longer a charade because they may actually have an impact on a judge's sentence.

However, *Booker* will not automatically produce richer sentencing rhetoric or more meaningful sentencing proceedings; for its promise to be fulfilled counsel will have to make persuasive arguments under § 3553(a) and judges will have to use the

4. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 85 (1998).

authority that *Booker* and the statute confer on them. In the hopes of encouraging and facilitating such use, we turn now to a discussion of post-*Booker* sentencing.

II. A THREE-STEP PROCEDURE FOR POST-*BOOKER* SENTENCING

The first two steps in sentencing after *Booker* are the same as they were before *Booker*: courts must make a calculation under the applicable guidelines, resolving any factual disputes necessary to that determination, and consider any requests for departures from the result pursuant to the Sentencing Commission's policy statements. However, the third step, the determination of the actual sentence, has changed. Courts are no longer limited to the narrow range produced by the Guidelines, but, rather, must impose sentence based on all of the factors set forth in § 3553(a).[5]

Section 3553(a) directs courts to consider seven factors:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed –
  (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  (B) to afford adequate deterrence to criminal conduct;
  (C) to protect the public from further crimes of the defendant; and
  (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the [advisory guideline] range . . . ;
(5) any pertinent policy statement ... issued by the Sentencing Commission . . . ;
(6) the need to avoid unwarranted sentence disparities . . . ; and
(7) the need to provide restitution to any victims of the offense.[6]

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5. *See, e.g.*, United States v. Page, No. 04-CR-106, 2005 U.S. Dist. LEXIS 19152, at *3 (E.D. Wis. Aug. 25, 2005); United States v. Beamon, 373 F. Supp. 2d 878, 880 (E.D. Wis. 2005).

6. 18 U.S.C. § 3553(a).

The statute is best understood as operating sequentially. First, courts must consider the nature and circumstances of the offense and the history and characteristics of the defendant; in other words, the specifics of the case before them. Second, they must evaluate the specifics of the case in light of more general societal needs such as ensuring that the sentence reflects the seriousness of the offense, promotes respect for the law, provides just punishment, affords adequate deterrence to criminal conduct, and protects the public from further crimes of the defendant. Finally, courts must translate their findings and impressions into a numerical sentence. In doing so, they must consider the kinds of sentences available for the offense (e.g., probation, home or community confinement, prison, or some combination thereof), the advisory guideline range, any pertinent policy statements issued by the Sentencing Commission, and any restitution due to the victims of the offense. In imposing a specific sentence, courts must also consider the need to avoid unwarranted sentence disparities among defendants with similar backgrounds convicted of similar offenses. The ultimate directive contained in the statute is, upon consideration of all of these factors, to impose a sentence sufficient, but not greater than necessary, to satisfy the purposes set forth in § 3553(a)(2).[7] This is the so-called "parsimony provision," which holds that when more than one sentence is reasonable in a particular case, courts must choose the lesser.[8]

III. ROLE OF GUIDELINES

Based on the statutory scheme that remains after *Booker's* excision of 18 U.S.C. § 3553(b),[9] courts should give the guidelines the same weight as the other § 3553(a) factors.[10] Section 3553(a) contains no suggestion that courts should give any one of the

7. *See, e.g.*, United States v. Peralta-Espinoza, 383 F. Supp. 2d 1107, 1109-10 (E.D. Wis. 2005); United States v. Leroy, 373 F. Supp. 2d 887, 894-95 (E.D. Wis. 2005).

8. *See* United States v. Carey, 368 F. Supp. 2d 891, 895 n.4 (E.D. Wis. 2005).

9. *Booker*, 125 S. Ct. at 756. Section 3553(b) made the guidelines mandatory, and its excision is what renders them advisory.

10. *See* United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D. Wis. 2005).

seven factors greater weight than the others. Although some have argued that the guidelines take into account the other § 3553(a) factors and are therefore entitled to great weight, this argument is flawed. Not only do the guidelines fail to consider all of the § 3553(a) factors, they in fact restrict or prohibit consideration of certain of them. For instance, the guidelines fail to take into account and generally forbid departures based on a defendant's age, education and vocational skills, mental and emotional condition, physical condition (including drug or alcohol dependence), employment record, family ties and responsibilities, socio-economic status, civic and military contributions, and lack of guidance as a youth.[11] This prohibition cannot be squared with the § 3553(a)(1) directive that courts consider the "history and characteristics" of the defendant.[12] The *Booker* Court itself recognized that while sentencing courts still had to "consider" the guidelines, they were free to "tailor the sentence in light of other statutory concerns as well."[13] If the guidelines fully accounted for all of the § 3553(a) factors, no tailoring would be necessary.

In our view, judges who declare that, as a matter of policy they will vary from the guidelines only in unusual cases are not only operating contrary to § 3553(a) but also disrespecting the decision of the merits majority in *Booker*. Imposing sentence based on disputed facts found by the judge under a preponderance of the evidence standard, freed from the Rules of Evidence and Criminal Procedure, violates the Sixth Amendment.[14] *Booker* saved the Guidelines only by freeing judges from their grip. Whether a judge is bound by § 3553(b), as before *Booker*, or by his own unwillingness to sentence outside the Guidelines, the result is the same – the defendant's right to trial by jury is violated.[15]

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11. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1-.6, .10-.12.

12. *Ranum*, 353 F. Supp. 2d at 986; *see also* United States v. Dean, 414 F.3d 725, 730-31 (7th Cir. 2005) (stating that "the defendant must be given an opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence, for it is possible for such a variant sentence to be reasonable and thus within the sentencing judge's discretion under the new regime in which the guidelines, being advisory, can be trumped by section 3553(a), which as we have stressed is mandatory").

13. 125 S. Ct. at 757.

14. *Id.* at 756.

15. Although the Seventh Circuit has held that a sentence imposed within a properly calculated guideline range is, on appeal, entitled to a

However, for several reasons the guidelines will continue to play an important role in sentencing. First, of the § 3553(a) factors, the guidelines are the only ones that suggest a numerical sentence. Although in any given case the numerical sentence called for by the guidelines may be entirely arbitrary,[16] merely by supplying a number, the guidelines offer sentencing courts a starting point. Second, by assigning numbers to a variety of factors that may be relevant to sentencing, the guidelines provide

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rebuttable presumption of reasonableness, *e.g.*, United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005), this does not mean that district courts must also operate under that presumption. Indeed, to do so would violate *Booker*. *See* United States v. Myers, 353 F. Supp. 2d 1026, 1028 (S.D. Iowa 2005) ("To treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable . . . . If presumptive, the Guidelines would continue to overshadow the other factors listed in section 3553(a), causing an imbalance in the application of the statute to a particular defendant by making the Guidelines, in effect, still mandatory."); *see also* United States v. Jordan, No. 05-1296, 2006 U.S. App. LEXIS 812, at *14 (7th Cir. Jan. 13, 2006) (holding that there is no presumption of unreasonableness that attaches to a sentence outside the range).

16. The Commission has never adequately explained how it came up with its proposed numerical sentences. It initially said that the guidelines mirrored past practices, but it later said that they did not. *See* Miller & Wright, *supra* note 2, at 752. To the extent that the Commission did consider past practice, commentators have questioned its methodology. *See, e.g.*, Morris E. Lasker & Katherine Oberlies, *The Medium or the Message? A Review of Alschuler's Theory of Why the Sentencing Guidelines Have Failed*, 4 FED. SENT'G REP. 166, 167 (Nov./Dec. 1991) ("The Commission's decision to calculate average pre-guideline sentences by counting only incarcerative sentences has produced sentences that are both substantially higher than pre-guideline sentences and higher than necessary to achieve the purposes of sentencing."). Further, the Commission in some areas departed from past practice and for ill-defined policy reasons decided to impose harsher sentences. *See, e.g.*, Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1221 (1999) (stating that the guidelines in public corruption cases called for sentences considerably higher than the pre-guidelines average); Louis F. Oberdorfer, Lecture: *Mandatory Sentencing: One Judge's Perspective–2002*, 40 AM. CRIM. L. REV. 11, 15 (Winter 2003) (stating that "the sentencing ranges for drug law violations were demonstrably higher, and the resulting sentences longer, than the pre-guidelines averages and means"). The increases called for in illegal re-entry cases were particularly harsh and arbitrarily implemented. *See* United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 962 (E.D. Wis. 2005) (discussing sixteen level enhancement under U.S.S.G. § 2L1.1, which was not supported by study or research, but rather suggested by one Commissioner and passed with little discussion).

courts with a means of quantifying non-guideline sentences.[17] Third, because *Booker* left intact § 3553(c), courts must continue to provide written reasons for sentences outside the guidelines.

IV. EXAMPLES OF FACTORS THAT CAN AFFECT SENTENCES

In drafting § 3553(a), Congress used very general terms. As a result, the statute encompasses a virtually unlimited number of factors that can affect sentences. We offer some illustrative examples.

A. *Good Character*

Although § 3553(a)(1) requires courts to consider the history and characteristics of the defendant, and § 3661 declares that there shall be no limit on the information concerning the defendant's character and background which the court may receive and consider, the guidelines focus almost exclusively on defendants' past criminal activities. In other words, in setting the imprisonment range, the guidelines consider only the bad things about the defendant and none of the good.[18] Thus, under the mandatory guidelines, courts typically had to impose virtually the same sentence on defendants who possessed positive character traits as on those who did not. Fortunately, § 3553(a) recognizes that defendants deserve to be judged based on more than their worst moments, and after *Booker* courts may treat defendants as whole people and sentence them based on all of their characteristics.[19]

B. *Motive*

Similarly, under the mandatory guideline regime, courts had

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17. *See, e.g.*, United States v. Alexander, 381 F. Supp. 2d 884, 890 (E.D. Wis. 2005); *Galvez-Barrios*, 355 F. Supp. 2d at 964.

18. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1715 (June 1992) ("Perhaps no provisions in the guidelines evoke more dismay from the federal judiciary, the probation service, and the bar than the policy statements [which] declare many personal characteristics of an offender to be 'not ordinarily relevant' to sentencing outside the applicable guideline range.").

19. *See, e.g.*, United States v. Page, No. 04-CR-106, 2005 U.S. Dist. LEXIS 19152, at *12 (E.D. Wis. Aug. 25, 2005); United States v. Ranum, 353 F. Supp. 2d 984, 990-91 (E.D. Wis. 2005).

to impose the same sentence on a defendant who stole $100,000 to pay for an operation for his sick child as on one who stole $100,000 to buy a yacht. This was so because, in white-collar cases, the guidelines focus almost exclusively on loss amount and largely ignore other measures of moral culpability. However, as indicated by the above example, defendants can cause the same amount of economic loss without being equally culpable. A person who offends as the result of difficult personal circumstances may be more deserving of leniency (as well as less likely to re-offend) than a defendant who steals out of greed or opportunism.[20] Similarly, a defendant who offends without seeking substantial personal gain or intending to harm another may be more entitled to leniency than one who acts out of avarice or malice.[21]

C. *Acceptance of Responsibility, Genuine Remorse and Payment of Restitution*

Under the mandatory guidelines, courts could grant a two- or three-level reduction in offense level if the defendant timely pleaded guilty.[22] Although courts could consider a variety of factors in determining whether to grant the reduction for acceptance of responsibility (e.g., voluntary withdrawal from criminal conduct, payment of restitution, surrender to authorities, or post-offense rehabilitative efforts),[23] these additional factors were usually irrelevant. If the defendant pleaded in time, he got the reduction.

After *Booker*, courts are no longer restricted by the narrow parameters of U.S.S.G. § 3E1.1, but rather may grant additional consideration to defendants who demonstrate acceptance beyond that necessary to obtain a two- or three-level reduction under the guideline. For example, a court might conclude that a defendant who voluntarily acknowledged criminal conduct before it was discovered and turned over all of his assets to the victim in an effort to make restitution was entitled to a greater reduction because such conduct was relevant to his character and to the

20. *See* United States v. Milne, 384 F. Supp. 2d 1309, 1312 n.4 (E.D. Wis. 2005).
21. *See Ranum*, 353 F. Supp. 2d at 990.
22. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005).
23. *Id.* at § 3E1.1 cmt. n.1.

likelihood that he would re-offend. *Booker* allows courts to recognize in their sentencing practices that it is desirable to encourage offenders to "mitigate their misconduct voluntarily, whether by admitting it, paying restitution or making efforts to address substance abuse, mental health or other problems that contributed to it."[24]

D. *The Girlfriend Problem*

Under § 3553(a) (but not the guidelines), courts may take into consideration the reality that defendants sometimes become involved in criminal conduct based on their relationships with others. Courts frequently see this phenomenon at work when they sentence women who assisted their husbands, boyfriends or male relatives in illegal drug-related activities.[25] The guidelines direct courts to sentence women in such situations based on the drug weight foreseeable to them regardless of whether they personally handled such an amount, and generally fail to take into account the often abusive or coercive relationships that led to the woman's involvement.

In too many cases, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity, who is typically the father of her children. Many of these women have histories of physical and sexual abuse and/or untreated mental illness. Ill-informed policies spawned by the war on drugs adversely impact children. In 1999 almost 1.5 million minor children had an incarcerated parent, with over 65% of women incarcerated in state prison having a minor child. The children are often placed in the care of friends or family—often leading to financial and emotional hardships—or end up in an overburdened child welfare system where they are at increased risk of becoming victims of sexual or physical abuse or neglect.[26]

Freed from the strictures of the guidelines, courts may factor such matters into their sentences where appropriate.[27]

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24. *Milne*, 384 F. Supp. 2d at 1312.

25. *See* United States v. Greer, 375 F. Supp. 2d 790, 794-95 (E.D. Wis. 2005).

26. *Id.* (quoting Legislative Briefing on The Girlfriend Problem, http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/legislative_bri.html (last visited Nov. 14, 2005)).

27. U.S.S.G. § 3B1.2 allows courts to grant a two to four level reduction

E. *Crack / Powder Disparity*

As is now notorious, both the Controlled Substances Act and the guidelines treat one gram of crack cocaine the same as one hundred grams of powder cocaine.[28] During the mandatory guideline regime, defendants challenged this disparity in every conceivable way without success.[29] However, now that the guidelines are advisory, courts need no longer sentence crack defendants based on the 100:1 ratio, which lacks any persuasive penological or scientific justification and produces a racially disproportionate impact.[30] Indeed, courts across the country have, in post-*Booker* cases, declined to follow the 100:1 ratio.[31]

Some commentators have suggested that it is inappropriate for courts to address the crack/powder disparity; others warn that deviations from the guidelines on this basis could spur Congress to enact a legislative *Booker*-fix.[32] However, judges cannot allow such considerations to prevent them from doing what is just in a particular case. The evidence in favor of narrowing or eliminating the gap between crack and powder cocaine is overwhelming; no one, as far as we are aware, supports the 100:1 ratio on the merits. It would be unseemly for the courts to blindly adhere to a sentencing scheme they know to be unjust based on the speculation that, if they don't, Congress may come up with something worse.

F. *Enabling Defendants to Pay Restitution*

The mandatory Guidelines generally barred courts from

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for mitigating role in the offense. However, in cases where the drug weight produces a high base offense level, this reduction is often insufficient.

28. *See* 21 U.S.C. 841(b)(1) (2005); 18 U.S.C. app. § 2D1.1(c) (2005).

29. *See, e.g.*, United States v. Frazier, 981 F.2d 92, 94 (3d Cir. 1992).

30. United States v. Smith, 359 F. Supp. 2d 771, 777-82 (E.D. Wis. 2005); *see also Beamon*, 373 F. Supp. 2d at 886-87 (collecting cases).

31. *See, e.g.*, United States v. Perry, 389 F. Supp. 2d 278, 307 (D.R.I. 2005) ("The growing sentiment in the district courts is clear: the advisory Guideline range for crack cocaine based on the 100:1 ratio cannot withstand the scrutiny imposed by sentencing courts when the § 3553 factors are applied."). *But see* United States v. Pho, No. 05-2455, 2006 U.S. App. LEXIS 153 (1st Cir. Jan. 5, 2006) (holding that district courts cannot reject the 100:1 ratio).

32. *See* Pamela A. MacLean, *Cracking the Code: After 'Booker' Judges Reduce Crack Cocaine Sentences*, NAT'L L.J. Oct. 3, 2005, at 1.

downwardly departing in order to enhance a defendant's ability to pay restitution.[33] However, § 3553(a)(7) directs sentencing courts to consider the need to provide restitution to crime victims. In some situations, this directive may justify fashioning a sentence to enhance a defendant's ability to pay. This is not an improper consideration of the defendant's "socio-economic status," nor is it an invitation to the rich to buy their way out of prison. Rather, in cases in which a restitution obligation is manageable, the defendant is employed and making a genuine effort to pay, and a prison sentence would cause him to lose his job, the court may consider the use of home or community confinement in order to facilitate payment efforts.[34]

G. *Unusual Personal Circumstances*

Not infrequently, courts encounter cases where defendants have undergone unusual and significant experiences that may be relevant to their sentences. Although, in theory, the mandatory guidelines authorized departures in certain unusual cases, in practice courts rarely granted them. Further, appellate courts policed downward departures with unwarranted and inexplicable zeal.[35] Now that the guidelines are advisory, courts are free to impose just sentences in cases where a traumatic experience contributes to an offender's misconduct. We offer two examples.

1. *Michael Page*

Michael Page was a forty-five-year-old man with no prior record, a solid work history, and a stable home and family life. One day, an acquaintance, Johnny Ray White, asked Page to drive him to a bank so that he could make a deposit. Unbeknownst to Page, White planned to rob the bank. White completed the crime, returned to the car, and Page, still unaware, drove away. Soon

33. *See, e.g.*, United States v. Chastain, 84 F.3d 321, 324-25 (9th Cir. 1996) (collecting cases).

34. *See, e.g.*, United States v. Peterson, 363 F. Supp. 2d 1060, 1062 (E.D. Wis. 2005).

35. *See generally* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM L. REV. 19, 83 (2003) ("One of the 'mysteries' of the Guidelines experience is that many appellate courts have opted to enforce them more rigidly than anyone predicted or than the relevant statutes appear to require.").

after, a squad car with lights flashing pulled behind Page, at which point White told him to "hit it" because he had just robbed the bank. Instead of pulling over as he should have, Page took off. He was subsequently arrested and charged with being an accessory after the fact to bank robbery.[36]

At sentencing, Page argued that his decision to flee was in part the product of a traumatic experience. Several years previously, his son Michael had been involved in a high speed chase with police during which he called 911 and stated that he was frightened and intended to drive home. Michael then pulled into the driveway of Page's home, and although he was unarmed, a police officer shot and killed him after he got out of the car. Page witnessed the incident, saw his son die, and was left with a profound distrust of law enforcement. He argued that when he saw the flashing lights, he fled because he feared that the police would harm him.[37] Of course, this was an unreasonable choice. But Page did not argue that his past trauma negated his guilt of the offense. Rather, under these circumstances, Page's prior experience bore on the extent of his culpability.[38]

2. *Quandella Johnson*

Quandella Johnson had a horrific childhood. For years, her father, a convicted sex offender, and his friends abused her sexually, physically and emotionally. Not surprisingly, she developed mental health and substance abuse problems and attached herself to abusive men. One of them involved her in several bank robberies, which resulted in a sixty-three month prison sentence. While in prison, Johnson made great strides, completing drug treatment, obtaining her GED, and taking various other classes. Upon her release, she got custody of her children. However, she soon began to have problems, using drugs, missing appointments and counseling sessions, and failing to pay restitution. These problems led to the revocation of her supervised release and another prison sentence.[39]

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36. United States v. Page, No. 04-CR-106, 2005 U.S. Dist. LEXIS 19152, at *1, *8-9 (E.D. Wis. Aug. 25, 2005).

37. *Id.* at *8-12.

38. *Id.* at *10-12.

39. United States v. Johnson, No. 05-CR-80, 2005 U.S. Dist. LEXIS 15742, at *2-3 (E.D. Wis. July 25, 2005).

The judge gave Johnson a date to report to prison but she failed to appear, leading to the issuance of a warrant for her arrest and a new criminal charge under 18 U.S.C. § 3146(a)(2).[40] However, Johnson had not fled the jurisdiction or gone into hiding to avoid law enforcement. Rather, she failed to report because she had not found anyone to care for her children during her sentence. Rather than requesting an extension until she could resolve her child care problems, she sat in her home and cried, waiting for the Marshal to come for her. When deputies arrived, she opened the door, turned and placed her hands behind her back without being ordered to do so, and was taken to jail. Based on these facts, Johnson was entitled to sentencing consideration. "In the hierarchy of failure to surrender cases, a depressed mother who stays home with her children for an extra six days around Christmas has to rank among the least serious."[41]

V. A WORD ABOUT DISPARITY

We conclude with a discussion of the issue of sentencing disparity, which opponents of advisory guidelines most frequently mention as the reason for restricting judicial discretion. There are several answers to this criticism of the advisory guideline regime. The easiest is that judges continue to impose sentences within the guidelines in nearly sixty-two percent of all cases, only a slight reduction from the years before *Booker*.[42] More importantly, though, there is no evidence that the mandatory guidelines created sentencing uniformity in any meaningful sense.[43] In fact, under the mandatory guidelines, racial disparity in sentencing actually increased.[44] With respect to disparity, Stith and Cabranes concluded that:

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40. Section 3146(a)(2) proscribes failure to surrender for service of a sentence.

41. *Johnson*, 2005 U.S. Dist. LEXIS 15742 at *11.

42. U.S. SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT 7 (Dec. 1, 2005) *available at* http://www.ussc.gov/bf.HTM.

43. *See, e.g.*, Michael O'Hear, *The Myth of Uniformity*, 27 FED. SENT'G REP. 249 (Apr. 2005).

44. United States v. Smith, 359 F. Supp. 2d 771, 780 (E.D. Wis. 2005) ("Before the guidelines took effect, white federal defendants received an average sentence of 51 months and blacks an average of 55 months. After the guidelines took effect, the average sentence for whites dropped to 50 months, but the average sentence for blacks increased to 71 months.").

1. Inter-judge sentence variation was not as rampant or as "shameful" in the federal courts under the pre-Guidelines regime as Congress apparently believed when it enacted the Sentencing Reform Act in 1984.

2. No thorough empirical study has demonstrated a *reduction* in the total amount of disparity under the Guidelines

3. While reduction of inter-judge disparity is a worthwhile goal for sentencing reform, it is a complex goal, and a myopic focus on this objective can result in a system that too often ignores other, equally important goals of a just sentencing system. Uniformity can itself be "unwarranted": when unprincipled, blind uniformity itself promotes *inequality*.

4. Important sources of disparity remain in the Guidelines regime, some acknowledged and others hidden from view. In particular, the exercise of the prosecutorial function is, despite the efforts of both the Sentencing Commission and the Department of Justice, inevitably a wellspring of disparate treatment. This does not mean that prosecutorial discretion should be suppressed, but rather that prosecutors should exercise discretion in the open, where it can be observed and, if necessary, checked by judges.[45]

Therefore, rather than worshiping the false idol of uniformity, we should focus on doing justice in individual cases. The regime now in place gives judges guidelines which are just that – guides in the exercise of discretion. Judges need not sentence different people the same just because their offense levels and criminal history scores call for identical terms. Further, because judges are sworn to uphold the law and will conscientiously fulfill their duty to protect the public when necessary, the notion that without mandates judges will jeopardize public safety is as insulting as it is unsupported. And, appellate review remains available for any sentence that is demonstrably unreasonable, either because it is too high or too low. Moreover, reinstating mandatory guidelines will do little to eliminate disparity as it exists now. Rather, its effect will be to transfer sentencing authority from judges to prosecutors, whose charging decisions, rather than the offender's conduct and background, will drive the sentence.

Finally, we note that there are many forms of disparity in this country. Criminal defendants are more likely to be poor and

45. STITH & CABRANES, *supra* note 4, at 106.

uneducated, unemployed, come from broken homes, have a history of childhood abuse or neglect, and suffer from mental health or substance abuse problems.[46] Perhaps the national discussion on crime control and correctional policy should focus more on these disparities, which antedate the commission of crime, rather than on ensuring that everyone gets the same amount of time in prison after the fact.

VI. CONCLUSION

Under our system of justice, judges, not prosecutors, are supposed to sentence defendants.[47] *Booker* represents a tremendous advance because for the first time in almost twenty years, courts are allowed to fulfill their sentencing responsibilities. However, the courts and counsel will have to work hard to ensure that *Booker's* promise is fulfilled.

46. *See, e.g.*, Daniel P. Mears, *Health Law in the Criminal Justice System Symposium: Mental Health Needs and Services in the Criminal Justice System,* 4 HOUS. J. HEALTH L. & POL'Y 255, 268-69 (2004) ("Jail and prison populations typically have higher rates of poverty and substance abuse."); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 47 (1994) ("Most felony defendants, whatever their race, tend to be poor, ill-educated, un- or underemployed, and not part of a stable household.").

47. *See* Lynn Adelman & Jon Deitrich, *AG's Misguided Proposals*, NAT'L L.J., Sept. 19, 2005, at 30.