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THE PENDULUM IN FEDERAL SENTENCING CAN ALSO SWING TOWARD PREDICTABILITY: A RENEWED ROLE FOR BINDING PLEA AGREEMENTS POST-*BOOKER*

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I. INTRODUCTION: THE CONVERSATION

A. The Guidelines Conversation

Defendant: What am I looking at if I plead guilty?

Counsel: The Guideline range is thirty-three to forty-one months.[1] There are no motions for a lower sentence in your case. We will argue for the "low end" of the Guidelines, thirty-three months, the government will likely ask for the middle, and the judge will likely impose something in between.

1. For illustrative purposes, the common federal offense of bank robbery may result in an applicable Guideline range of thirty-three to forty-one months. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2B3.1 (2009), *available at* http://www.ussc.gov/Guidelines/2009_guidelines/Manual/GL2009.pdf. This hypothetical assumes a base offense level of twenty, a two-level sentencing enhancement for financial institution, and a three-level reduction for acceptance of responsibility for a total offense level of nineteen. Assuming a criminal history of Category II results in a Guideline range of thirty-three to forty-one months. *See id.* § 5.A (Sentencing Table).

*B. The Post-*Booker *Conversation*

Defendant: What am I looking at if I plead guilty?

Counsel: It is difficult to say. The law that applies to sentencing in federal court changed dramatically in 2005. The Guidelines dictated sentencing and required the court to sentence within a range, here thirty-three to forty-one months. Now, the judge could sentence you to anywhere from no jail to the maximum of twenty years.[2]

Defendant: So what changed?

Counsel: Today, the Guidelines are just "advisory." The court must still calculate and start from thirty-three to forty-one months. The court must still consider any motions to lower that sentence called downward departures, which don't apply in your case. The court then considers some general factors about sentencing and imposes a sentence that is "reasonable."

Defendant: Then the judge will give me something within the thirty-three to forty-one months?

Counsel: Before 2005, my answer would have been yes. Today, it varies depending on several factors: the facts of the case, your personal history and circumstances, the goals of sentencing, and even which judge we draw.

The good news is judges are sentencing defendants to terms below the guideline range in more than forty percent of cases.

Defendant: That's good. I might get less than the thirty-three months then.

Counsel: Well, maybe but maybe not. That more than forty percent statistic may be misleading, because it includes cases when the government files motions for lower sentences and cases when the defense has a viable motion for a lower sentence. We don't have either in your case.

Further, based on the process the court must go

2. In the same example as *supra* note 1, the bank robbery carries a statutory maximum of twenty years. *See* 18 U.S.C. § 2113(a) (2006). Again, with the factors outlined above in *supra* note 1, the offense resulted in an applicable Guideline range of thirty-three to forty-one months. *See* U.S. SENTENCING COMM'N, *supra* note 1, §§ 2B3.1, 5.A.

through, there are reasons that may cause the judge to go below the range, within the range, or possibly, although not likely, above the range.

Defendant: It sounds like I won't know much, and you can't predict much, even if I decide to plead guilty. I won't really know anything more about my future until the day of sentencing.

Counsel: I'm afraid that is the state of law in federal sentencing right now.

Defendant: For my own piece of mind, I would plead guilty and agree to two and half years right now. Can't you just ask the prosecutor if she would agree to that?

Prior to the era of the United States Sentencing Guidelines (the Guidelines),[3] federal prosecutors and defendants entered into plea agreements that included a "specific sentence or sentencing range."[4] Binding plea agreements served an important function of counterbalancing the vast judicial discretion at sentencing.[5] The federal judiciary enjoyed wide discretion in imposing a sentence;[6] the government's and defendant's freedom to contract for an appropriate sentence mirrored that discretion.

In 1987, the United States Sentencing Commission (the Commission), implemented the Guidelines.[7] Congress mandated

3. U.S. SENTENCING COMM'N, GUIDELINES MANUAL (1987) (amended 1989). The "era" of the mandatory Guidelines is defined as November 1, 1987, the date the Guidelines became "effective," to January 12, 2005, the date of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

4. FED. R. CRIM. P. 11(c)(1)(C).

5. There are several reported pre-Guidelines, binding plea agreement cases. *See, e.g.*, United States v. Kamer, 781 F.2d 1380 (9th Cir. 1986); United States v. Burruezo, 704 F.2d 33 (2d Cir. 1983); United States v. Blackwell, 694 F.2d 1325 (D.C. Cir. 1982). In these reported cases, the defendant thereafter challenged a portion of the sentence imposed pursuant to the binding plea agreement. It is important to note that nearly all binding plea agreements present neither an issue for appeal nor a need for written opinion at the district court level.

6. *See* Michael Fisher, *Striking a Balance: The Need to Temper Judicial Discretion Against a Background of Legislative Interest in Federal Sentencing*, 46 DUQ. L. REV. 65, 67–70 (2007) (outlining the historical fluctuations of judicial discretion in federal sentencing theory). The Court, prior to 1987, sentenced a defendant convicted of a felony to a term of imprisonment between the statutory minimum (often no jail time) and maximum for the offense of conviction; thus, prior to the Guidelines, the court imposed a sentence anywhere from no jail time to twenty years in prison in the bank robbery. *See* example in *supra* text accompanying notes 1–2; *see also* 18 U.S.C § 2113 (2002).

7. *See* U.S. SENTENCING COMM'N, *supra* note 3.

that the Guidelines severely limit the court's discretion at sentencing.[8] Aside from its legislative goals of uniformity and proportionality, the mandatory federal sentencing scheme promoted predictability and informed decision making for the defendant.[9] The mandatory Guidelines effectively replaced binding plea agreements. Upon indictment, the defendant already faced his likely "specific . . . sentencing range,"[10] as set out in the Guidelines.

Without a need to do so, the Guidelines then further marginalized the role of binding plea agreements through policy statements and commentary.[11] Binding plea agreements, as a result, became a stigmatized novelty in federal criminal practice. This valuable tool, as a result, has remained underutilized and unavailable to criminal defendants for more than twenty years.[12]

In 2005, in *United States v. Booker*, the Supreme Court relegated the Guidelines to a mere sentencing consideration that is no longer mandatory on federal district judges.[13] The Court introduced a new process in federal sentencing.[14] The fall of the Guidelines may benefit defendants statistically,[15] yet the new process will never be as predictable and informative.[16] After more than twenty years of isolated and inconsistent use, binding plea agreements could again restore some predictability and informed decision making for the

8. *See* 18 U.S.C § 3553(b) (2009).

9. *See infra* Part II.C (discussing predictability and informed decision making for the defendant as collateral benefits of the mandatory Guidelines).

10. *See* FED. R. CRIM. P. 11(c)(1)(C) (allowing the parties in a criminal case to negotiate a "sentencing range" before the Commission usurped that phrase in the Guidelines).

11. *See* U.S. SENTENCING COMM'N, *supra* note 3, § 6B1.2, cmt. background (defining the standard for judicial acceptance of a binding plea agreement and over-defining the "justifiable reasons" the court may rely upon); *see also infra* Part III.B (discussing binding plea agreements as meaningless under the Guidelines).

12. *See infra* Part III.A–B (arguing that the mandatory Guidelines effectively replaced binding agreements and, through Guidelines' policy statements, rendered these agreements meaningless for more than twenty years).

13. United States v. Booker, 543 U.S. 220, 226 (2005).

14. *Id.* at 245–46 (setting out the new process of federal sentencing with "advisory guidelines").

15. *See infra* Part IV.C.2 and note 222 (discussing the favorable statistics for the defendant at sentencing post-*Booker*). In 2009, district court judges imposed sentences below the applicable Guidelines range in more than forty-three percent of federal criminal cases and the average variance from the Guideline range in these cases has increased as well. *See infra* Part IV.C.2 and note 222.

16. *See infra* Part II.C (discussing predictability and informed decision making as collateral benefits of the mandatory Guidelines for the individual defendant).

defendant.[17]

We do not have to be resigned to the above conversation as the post-*Booker* norm. This article argues that in addition to the swing toward increased judicial discretion and overall lower sentences, the pendulum *also* can swing toward predictability and informed decision making for the defendant. The federal sentencing scheme must allow a defendant to pursue, negotiate, and contract for *what the defendant believes* is a uniform, proportional, and fair sentence.[18] Increased use of binding plea agreements in federal court could complement the progressive developments following *Booker* and restore some predictability and informed decision making to federal sentencing.[19] However, without significant rule, policy, and perception changes, like those proposed in Part VI of this article, binding plea agreements will continue to be disfavored by some district courts,[20] carry an unwarranted stigma among prosecutors,[21] and remain underutilized and largely unavailable to

17. *See infra* Part V (discussing a renewed role for binding plea agreements post-*Booker*); *infra* Part VI (proposing rule, policy, and perception changes to encourage binding plea agreements in federal criminal practice and restore some predictability and informed decision making for the defendant).

18. *See* FED. R. CRIM. P. 11(c) (setting out some specific terms that may appear in federal plea agreements, including "specific sentences" and applicability of Guidelines' provisions); *see generally* Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach To Enforcing Plea Bargains*, 38 N.M. L. REV. 159 (2008) (discussing that a solution to the problem would be to apply contract law principles consistently and fairly in enforcing plea agreements); Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909 (1992).

19. *See infra* Part V (proposing a renewed role for binding plea agreements post-*Booker*).

20. *See, e.g.*, United States v Seidman, 483 F. Supp. 156, 158 (D. Wis. 1980) ("At the outset, the Court would note that it never will accept a [binding] plea agreement. It is this Court's prerogative to determine the type of sentence that should be imposed upon a defendant for the offense of which he or she has been adjudged guilty."); *cf.* United States v. Coney, 390 F. Supp. 2d. 844, 845 (D. Neb. 2005) ("When such a plea agreement smells too much like cow manure siphoned from a feedlot after a swampy, summer rain, judges should not pretend the odor is lilac. On the other hand, if the plea agreement stinks, but the stench is more like kitty litter than cow manure, a judge should hold his or her nose and move on. The trick is to discern the difference."); *see infra* note 241 and accompanying text (demonstrating how district court judges may continue to disfavor binding plea agreements after the Supreme Court restored their discretion in *Booker*). In *Coney*, the district court judge ultimately accepted a binding plea agreement calling for a sentence below the Guidelines. *See Coney*, 390 F. Supp. 2d at 850 (finding "justifiable reasons" to accept the binding plea agreement).

21. *See infra* notes 88–92 and 237–39 (discussing Department of Justice protocol that discouraged the type of discounted binding plea agreements Congress intended when it enacted FED. R. CRIM. P. 11(c)(1)(C)).

criminal defendants.

Part II of this article presents a brief historical background of federal sentencing and the policy goals behind the Guidelines' implementation. Part III discusses the binding plea agreement under Rule 11 of the Federal Rules of Criminal Procedure. This Part also explains how the mandatory Guidelines effectively replaced the binding plea agreement and how the Commission and the Department of Justice (DOJ) have marginalized the use of this valuable tool for more than twenty years. Part IV summarizes the constitutional challenge to judicial findings of sentencing enhancements that was ultimately struck down in *Booker*, as well as the disconnect between the constitutional challenge and the Court's ultimate remedy of rendering the Guidelines "advisory." This Part also discusses the current state of federal sentencing practice post-*Booker* in terms of renewed judicial discretion, the benefit to defendants, and liberated prosecutors.

Part V proposes that binding plea agreements should again become an integral part of federal practice. Last, Part VI proposes rule, policy, and perception changes that can assist in establishing a renewed role for binding plea agreements in federal criminal practice. These include proposed revisions to Rule 11 and the Guidelines' treatment of binding plea agreements, a proposed model local rule, and sample plea agreement language, each designed to encourage the use of binding plea agreements after *Booker*. These changes are designed to promote predictability and informed decision making at sentencing.

II. FEDERAL SENTENCING POLICY AND THE EVOLVING LANDSCAPE

Keeping current with the changes in federal sentencing has been a challenging proposition since the late 1990s.[22] The evolution from pre-Guidelines to post-Guidelines federal sentencing can be described as "coming full circle."[23] Yet, for the

22. *See also infra* Part II.D.2 (discussing how the Guidelines amplified episodes of prosecutorial discretion); Part III.B and note 90 (discussing *sub rosa* understandings in binding plea agreements); *see also* John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 648–50 & n.38–44 (2008) (discussing binding plea agreements that were sent underground by the mandatory Guidelines).

23. *See* Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in* Booker *and* Fanfan, 33 PEPP. L. REV. 615, 650 (2006) (discussing *Booker*'s almost twenty-year impact on federal sentencing); *see also* Douglas A. Berman,

individual defendant, the post-*Booker* state of federal sentencing is lacking in consistency and predictability.[24] The seismic changes in *Booker* were progressive and positive developments. For purposes of this article, it is assumed that federal sentencing is more sophisticated, well-reasoned, and fair today than it was before the mandatory Guidelines.

A. Before the Mandatory Guidelines

Prior to 1987, federal district court judges imposed criminal sentences based on their own notions of fairness, compassion, and justice.[25] Because each judge was left to apply his or her own

Reasoning Through Reasonableness, 115 YALE L.J. POCKET PART 142, 142 (2006) ("*Booker* and § 3553(a) thus demand that federal sentencing judges exercise reasoned judgment by filtering the Guidelines' advice through the provisions of § 3553(a); by doing so, district judges avoid giving any particular judge-found fact a 'determinate' role in calculating the sentence, and thereby avoid the constitutional problem identified in *Booker*."); Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of* Gall, Kimbrough*, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 118 (2008) (outlining the transition from sentencing in the discretion of the judges pre-Guidelines to sentencing under the federal Sentencing Guidelines).

24. *See* David C. Holman, *Death by a Thousand Cases: After* Booker, Rita, *and* Gall, *the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 288 (2008) ("Because the presumption is a 'nonbinding appellate presumption,' the sentencing judge is not required to impose a Guidelines sentence. The Court assumed that the district court judge may freely assign any sentence between the statutory minimum and maximum. If that is the case, then judge-found facts and the advisory Guidelines range are mere factors among many that judges may use to select a sentence. A judge could find facts that would triple a Guidelines sentence, but still permissibly sentence the defendant well below the Guidelines range. The constitutionality of the presumption of reasonableness completely depends on the truly advisory nature of the Guidelines."); Jefferson Exum, *supra* note 23, at 124 ("Researchers have explained that '[t]o the extent that judges use different judgmental anchors to make their sentencing decisions, the resulting sentences are likely to differ.'" (citing Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1537 (2001))).

25. *See* S. REP. NO. 98-225, at 31, 38 (1983); *see also* Brief for the United States Sentencing Commission as Amici Curiae Supporting Respondent, Claiborne v. United States, 551 U.S. 338 (2007) (No. 06-5754), 2007 WL 173622, at *1 ("Before the Act, 'each judge [was] left to apply his own notions of the purposes of sentencing. As a result, . . . Federal judges mete[d] out [a] . . . wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.'" (quoting S. REP. NO. 98-225, at 38) (alterations in original)); Christine DeMaso, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under* Booker*?*, 106 COLUM. L. REV. 2095, 2099 (2006)

notions of the purpose of sentencing, the federal sentencing system exhibited "an unjustifiably wide range of sentences to offenders . . . convicted of similar crimes."[26] Courts even differed about which considerations to apply at sentencing. Before the mandatory Guidelines, *where* charges were brought and *which judge* would preside were as important to the criminally accused as *what* charges were brought.[27]

Federal sentencing lacked clear policy statements and considerations to guide lifetime-appointed judges when evaluating individual defendants and their offense conduct. Congress grew concerned with unfettered judicial discretion at sentencing.[28] The dangers of a sentencing scheme overly reliant on judicial discretion and without articulated goals were expressed in terms of "unwarranted sentencing disparity" and the need for "uniformity."[29] Further, the larger public policy discussions about the utility and effect of punishment and the criminal justice system's role in serving those goals gained momentum during the 1970s and early 1980s.[30] Congress reacted to a negative public perception of the

(discussing how pre-Guidelines "judges had nearly absolute and unreviewable sentencing discretion").

26. *See* S. REP. NO. 98-225, at 31, 38. Senator Ted Kennedy argued that sentencing guidelines were necessary because "[f]ederal criminal sentencing is a national disgrace. Under current sentencing procedures, judges mete out an unjustifiably wide range of sentences to offenders convicted of similar crimes." 130 CONG. REC. 1644 (1984).

27. *See generally* James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999).

28. S. REP. NO. 98-225, at 38; *see also* Mistretta v. United States, 488 U.S. 361, 364 (1989) ("Congress delegated almost unfettered discretion to the sentencing judge to determine" a convicted defendant's sentence, but a review of the legislative history strongly suggests that the sentencing disparity that Congress hoped to eliminate did not stem from prosecutorial discretion, but instead from unchecked judicial discretion in formulating sentences.); United States v. LaBonte, 70 F.3d 1396, 1400 (1st Cir. 1995) ("Three principal forces propelled the legislation: Congress sought to establish truth in sentencing by eliminating parole, to guarantee uniformity in sentencing for similarly situated defendants, and to ensure that the punishment fit the crime."), *rev'd on other grounds*, 520 U.S. 751 (1997).

29. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 135398 Stat. 1837 (1987), *reprinted in* 1984 U.S.C.C.A.N. 3182; S. REP. NO. 98-225, at 38–59 (collectively S. REP. NO. 98-225).

30. *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 24–43 (1974).

federal system's lack of a sentencing scheme.[31]

These influences eventually compelled Congress to draft legislation and overhaul federal sentencing.[32] Congress passed the most comprehensive federal sentencing legislation in history, the Sentencing Reform Act of 1984 (SRA),[33] and therein created the Commission.[34] As part of the SRA, Congress introduced into federal criminal jurisprudence statutes setting forth "factors to be considered" at sentencing and other issues related to sentencing.[35]

The Commission was charged with fundamentally changing federal sentencing and the wide disparity of results throughout the federal system.[36] The Commission also published policy statements, additional sentencing considerations, and commentary. The culmination of the Commission's work was implemented as the Federal Sentencing Guidelines in 1987. The Guidelines incorporated and expanded the statutory sentencing factors[37] and, in turn, a corresponding statute made the Guidelines mandatory in federal court.[38] Congress expressly tasked the Commission with collecting federal sentencing data. The Commission's ongoing function was to assess and adjust the Guidelines accordingly.[39] The Commission did, and still does, just that.[40]

31. *See* S. REP. NO. 98-225, at 38.
32. *See id.*
33. *See id.* at 39.
34. *See id.*
35. 18 U.S.C. § 3553(a) (2009).
36. *See* S. REP. NO. 98-225, at 39.
37. The Guidelines are "the expert attempt" of the Commission to "weigh [the § 3553(a) sentencing] factors in a variety of situations." United States v. Terrell, 445 F.3d 1261, 1265 (10th Cir. 2006).
38. Prior to *Booker*, federal criminal practitioners and district court judges paid little attention to the "factors to be considered at sentencing" in 18 U.S.C. § 3553(a). This supports the premise that policy statements and "goals" would likely be ignored if they are not mandatory. Today, practitioners and judges recite and apply the factors in § 3553(a) because appellate courts have remanded and held that sentences are procedurally unreasonable if the factors were not considered on the record. *See infra* note 222 (outlining the procedural and substantive components of the "reasonableness" review on appeal).
39. 28 U.S.C. § 994(o) (2010). The Commission continues to collect data and draft modifications to the Guidelines. *See, e.g.*, U.S. SENTENCING COMM'N, *supra* note 1, § 5H1.11 (stating the recently added sentencing considerations for military, civic, charitable, or public service); Notice of Final Priorities, 74 Fed. Reg. 46478, 46479 (Sept. 9, 2009) (stating the policy priorities identified in response to public comment on proposed priorities).
40. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 370 (1989) ("In addition to the duty the Commission has to promulgate determinative-sentence guidelines, it is under an obligation periodically to 'review and revise' the guidelines."

Congress did not envision, nor did the Commission set out to develop, the most complicated mathematical word problem known anywhere in criminal law.[41] Yet, once the Commission embarked upon the enormous task of reducing federal convictions into a complex matrix calculation, the result was inevitable.[42] The Commission, with some foresight and flexibility, designed its work to develop based upon appellate court interpretation and further legislative action.[43] The Commission's mandate and continued functions are designed to promote the goals of uniformity and proportionality at sentencing.[44]

B. Uniformity and Proportionality Under the Mandatory Guidelines

The federal criminal justice system needed a new sentencing scheme to promote uniformity[45] and proportionality.[46] The

(quoting 28 U.S.C. 994(o) (1988))).

41. *See, e.g.*, William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 584 (1992). "In the end, the Commission had to balance the comparative virtues and vices of broad, simple categorization with detailed, complex subcategorization and devise a system that could most effectively meet the statutory goals of sentencing reform." *Id.* at 575.

42. *See, e.g.*, United States v. Barnes, 910 F.2d 1342, 1346 (6th Cir. 1990) (Ryan, J., concurring) (discussing the "complex matrix of presumptions, rules, regulations, and arithmetical formulae that comprise the sentencing guidelines").

43. *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 2 (1988) ("The spirit of compromise that permeates the Guidelines arose out of the practical needs of administration, institutional considerations, and the competing goals of a criminal justices system . . . .").

44. *See* JACK M. KRESS, PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES 10 (1980); *see also* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 785 (2006) ("Rising departure rates [from the Commission's mandates] can thus fairly be characterized as an indication that many judges lack a strong commitment to the guidelines' vision of uniformity."); William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 70 (1993) ("[T]he SRA seeks to reconcile competing goals of proportionality and uniformity.").

45. *See* Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (2004) ("[R]educing sentencing disparity . . . requires a coherent underlying theory of punishment, because disparity is not a self-defining concept."); O'Hear, *supra* note 44, at 750 ("[U]niformity seeks to eliminate unwarranted sentencing disparities, but also to provide for warranted disparities. The problem lies in distinguishing the warranted from the unwarranted."); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1352–62 (1997) (defending the Guidelines while describing Congress's goals).

46. *See* 28 U.S.C § 991(b)(1)(B) (2010); U.S. SENTENCING COMM'N, *supra* note

Commission implemented the Guidelines to include definitive provisions and policy statements aimed at these goals. The policy statements and commentary aim to promote uniformity and proportionality in the federal system.[47] A uniform sentencing system promotes honesty, fairness, and justice.[48]

Congress, at the same time, promulgated a statute that made the Guidelines binding on federal judges.[49] The mandatory nature of the Guidelines further supported the goals of uniformity and proportionality.[50] The mandatory Guidelines also leveled the disparity among jurisdictions and individual judges and curbed forum shopping and prosecutorial gamesmanship.[51]

1, § 1A1.3 (Congress set out three goals in the preamble to the Guidelines: (1) "honesty in sentencing"; (2) "uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders"; and (3) "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."); *see also infra* Part V.A (discussing how the Supreme Court, in formulating the "reasonableness" standard of review, has centered on uniformity, as opposed to predictability and informed decision making for the individual defendant).

47. *See* 28 U.S.C. §§ 994(a)(2), 995(a)(1) (2010) (requiring the Commission to issue "general policy statements" regarding the application of the guidelines and to "establish general policies . . . as are necessary to carry out the purposes" of the legislation).

48. *See* 28 U.S.C § 991(b)(1)(B) (2010) (stating that the purposes of the United States Sentencing Commission are to "provide certainty and fairness in meeting the purposes of sentencing"); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1217 (2004) (citing "honesty" as a goal in the federal sentencing scheme).

49. *See* 18 U.S.C. § 3553(a) (2010).

50. Multiple sections of the Guidelines Manual outline mandatory minimum sentences. *See* U.S. SENTENCING COMM'N, *supra* note 1, §§ 2A3.6, 2B1.5, 2D21; *see also* O'Hear, *supra* note 44, at 785 ("Still, while prosecutors may encourage or acquiesce, the decision to depart ultimately lies with the judge. Rising departure rates can thus fairly be characterized as an indication that many judges lack a strong commitment to the guidelines' vision of uniformity.") (citing Miller, *supra* note 48, at 1237–38).

51. *See, e.g.*, United States v. Avalos, 541 F.2d 1100, 1104–05 (5th Cir. 1976) (noting the prosecution's deliberate attempt at gaining a tactical advantage through forum shopping); *see generally* Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing*, 101 YALE L.J. 1109, 1120–21 (1992) (discussing the prosecutorial gamesmanship inherent in gathering information for the court's consideration at sentencing and in U.S. Probation's presentencing reports).

The Commission crafted well-defined categories of offensive conduct, enhancements, and reductions[52] combined with narrowly constructed grounds for departure.[53] Similarly situated defendants, those who committed similar offenses with similar characteristics and having similar criminal histories were treated uniformly, or as consistently as possible,[54] throughout the country.[55] Amendments

52. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, §§ 217(a), 235(b)(1), 98 Stat. 1987, 2020, 2032 (1984); *see also* U.S. SENTENCING COMM'N, *supra* note 1, chs. 2–3 (defining the many offense conduct and reduction calculations in the Guidelines).

53. The Guidelines define its created terminology, including offense level, reduction, enhancement, and departure. The court's narrow departure authority was set out in U.S. SENTENCING COMM'N, *supra* note 1, § 5K2.0 (Grounds for Departure)*; see also id.* § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), § 5H1.6 (Family Ties and Responsibilities), § 5H1.7 (Role in the Offense), § 5H1.8 (Criminal History), § 5K2.10 (Victim's Conduct), § 5K2.12 (Coercion and Duress), § 5K2.13 (Diminished Capacity), § 5K2.20 (Aberrant Behavior). Prior to *Booker*, if the court departed from the guideline range, an appellate court could review the "reasonableness" of the departure. *See* 18 U.S.C. § 3742 (2010).

54. The United States Attorney's Manual describes how the "United States Attorney, within his/her district, has plenary authority with regard to federal criminal matters." *See* U.S. ATTORNEY'S OFFICE, DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL §§ 9–2.001 (1997) [hereinafter ATTORNEY'S MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html. This plenary authority creates legitimate, yet tangible, differences and the justified disparity in legitimate prosecutorial practices, or even a disparity in sentences resulting from prosecutorial practices, is rarely, if ever, a proper basis for departure from the Sentencing Guidelines range. *See* U.S. SENTENCING COMM'N, *supra* note 1, § 1B1.1.

The U.S. Attorney and his or her delegates, through local rules and practices and "internal policy," create different standards for declinations, *see* ATTORNEY'S MANUAL at § 9-2.020, charging thresholds or otherwise authorizing prosecution, *id.* § 9-2.030, post-indictment charging by information and dismissal of indictments, *id.* § 9-2.050, acceptance of responsibility reductions, *id.* § 3B1.1, filing substantial assistance downward departure motions and valuing downward departure motions, *id.* § 5K1.1, and filing special informations related to statutory enhancements, *see* 21 U.S.C. § 851 (1970) (requiring filing of special information related to prior convictions); United States v. LaBonte, 520 U.S. 751, 761–62 (1997) (describing a prosecutor's discretion to "determine whether a particular defendant will be subject to the enhanced statutory maximum, . . ." [such as an 851 enhancement, which is] "similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect"); ATTORNEY'S MANUAL, *supra*, § 9-27.450 (requiring a formal "approval system" but deferring to the U.S. Attorney to establish the parameters of the system).

55. *See* 18 U.S.C. § 3553(a)(6) (2010) (incorporating uniformity into the "factors to be considered" at sentencing); *see also* Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After* Booker, 37 MCGEORGE L. REV. 627, 629 (2006) ("In the post-Booker world, the most common use of [18 U.S.C. § 3553](a)(6) has perhaps been as a basis for reducing or eliminating the

to the Guidelines, appellate decisions, and sentencing proceedings interpreting the Guidelines discussed specific case facts and offender characteristics in terms of these goals.[56] In practice, however, the mandatory Guidelines were not without loopholes that undercut true uniformity.[57]

C. Predictability and Informed Decision Making

Predictability and informed decision making served as oft-overlooked collateral benefits of the mandatory federal sentencing scheme.[58] The Supreme Court has discussed federal sentencing in terms of its predictability during the mandatory Guidelines era.[59]

The Guidelines were inflexible, draconian, and skewed toward harsher punishments; yet, they were predictable as to the outcome and, for better or worse, provided valuable information to the defendant early in a criminal case. The predictability and information inherent to the Guidelines led to more informed decisions about guilty pleas, meaningful cooperation, and the risk

differences in sentences that would otherwise be imposed on co-defendants pursuant to the Guidelines."); DeMaso, *supra* note 25 (noting that prior to the Guidelines, "judges had nearly absolute and unreviewable sentencing discretion").

56. *See, e.g.*, United States v. Mejia, 953 F.2d 461, 467–68 (9th Cir. 1991) (denying the defendant's motion for downward departure based upon proportionality with co-defendants and holding that "[b]asic notions of fairness dictate that defendants should be sentenced in proportion to their crimes . . . . [Yet, a] downward departure to correct sentencing disparity brings a defendant's sentence more into line with his or her codefendant's sentence, but places it out of line with sentences imposed on all similar offenders in other cases").

57. *See infra* Part II.D (discussing the loopholes and lack of uniformity in the federal sentencing system under the Guidelines and in matters left to prosecutorial discretion). *See generally* Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255 (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604611 (exploring the "localized meaning" of provisions in the Guidelines, such as departures for "substantial assistance" to law enforcement and reductions for "acceptance of responsibility").

58. *See* Daniel Ryan Koslosky, Comment, *Constitutional Law: Predictability as Fairness and the Possible Return to Federal Indeterminate Sentencing*, 57 FLA. L. REV. 999, 1006–10 (2005) (analyzing *Booker* and noting that the decision allows defendants to better "predict the term of incarceration that they face at the commencement of the criminal proceeding").

59. *See, e.g.*, Koon v. United States, 518 U.S. 81, 113 (1996) (stating that the pre-Guidelines system of indeterminate sentencing lacked "uniformity, predictability, and a degree of detachment"); Mistretta v. United States, 488 U.S. 361, 366 (1989) (discussing how the pre-Guidelines federal sentencing scheme led to "widespread dissatisfaction with the uncertainties" regarding federal sentencing).

associated with trial.[60] The Guidelines also permitted the defendant to be involved in deciding his or her own fate.

The mandatory Guidelines empowered defendants with more pointed advice from counsel and, accordingly, more informed decision making. A defendant pleading guilty during the mandatory Guidelines era had a firm understanding about what lie ahead at sentencing. The individual defendant valued the benefits of predictability and informed decision making as much as, if not more than, Congress's and the Commission's goals of uniformity and proportionality.

The loss of benefits like predictability and the defendant's information at sentencing may be an ancillary cost of the progressive developments in federal sentencing. Some might opt for overall lower sentences instead of generalized notions of predictability and informed decision making. The argument begs the question: can judicial discretion and a more individualized federal sentencing scheme coexist with the defendant's need for predictability and informed decision making at sentencing? As argued in this article, through the use of binding plea agreements, the answer is yes.[61]

D. "One Size Fits All" Did Not Fit

The mandatory Guidelines had an adverse impact on all involved in a federal sentencing proceeding.[62] The district court

60. In the federal criminal system, sentencing and cooperation are intertwined throughout the procession of a case. *See* ATTORNEY'S MANUAL, *supra* note 54, § 9-27.230 (listing general guidelines for federal prosecution and declination of prosecution, including the person's willingness to cooperate in the investigation or prosecution of others and the probable sentence or other consequences if the person is convicted); *see also* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 9, 13 (2000) (equating "cooperation agreements" to government bribery).

61. *See infra* Part V (discussing the renewed role for binding plea agreements to restore the predictability and informed decision making lost after *Booker*).

62. The Guidelines significantly curtailed judicial discretion at sentencing. The sentencing court exercised its discretion within a range of six or twelve months in most cases, as compared to a span of ten-to-twenty years established by statute. *See* U.S. SENTENCING COMM'N, *supra* note 1. The Guidelines similarly impacted prosecutorial discretion in most matters related to sentencing. After the decisions related to charging and potential cooperation, the federal prosecutor played a minimal role in the sentencing of most defendants. *Id.* Most importantly, the Guidelines prescribed an outcome for the individual defendant based upon his offense conduct and criminal history, and with less attention to his individual circumstances. *See supra* note 53 (listing some of the individual

judge, prosecutor, and individual defendant each had their role significantly limited by the mandatory Guidelines.[63] A "one size fits all" approach unfairly simplified and categorized the difficult task of sentencing *individual* defendants.[64] The Guidelines dictated the process and hamstrung the parties for almost twenty years while mandatory and, to some degree, still do so today.[65]

With a limited role in the "plea and sentence" federal system, the balance of the district court's impressions, compassion, or ire about a case or an individual defendant were pigeon-holed into its "discretion" to sentence within a relatively small range of options.[66] The Guidelines severely usurped most post-indictment situations reserved for prosecutorial discretion,[67] and, in turn, abuses of

considerations that did not warrant a downward departure).

63. *See supra* Part I. The defendant's role at sentencing is not that far removed from "the Guidelines conversation." *See supra* Part I.A. The defendant's conduct and criminal history produced a numerical range and the vast majority of imposed sentences followed that mathematical guidance. *Id.*

64. *Compare* United States v. Rausch, 570 F. Supp. 2d 1295, 1305 (D. Colo. 2008) ("The criteria also point to individuated considerations: *No one size fits all.* The object of this balancing process is to achieve not a perfect or a mechanical sentence, but a condign one-one that is decent, appropriate and deserved under all attendant circumstances.") (emphasis added), *with* United States v. Quigley, 30 F.3d 135 (Table), Nos. 93-1429, 93-1520, 1994 WL 399569, at *2 (6th Cir. Aug. 1, 1994) (describing how the defendant, "who had no criminal history, [was] unfortunate enough to have committed a crime that lump[ed] him together with more dangerous and hardened criminals, [making him] suffer the consequences of one-size-fits-all sentencing"). Courts often discussed "one-size-fits-all" when considering downward departures under Guidelines section 5K2.0, "Grounds for Departure," because the Guidelines provision was too sweeping in the case at issue. *See, e.g.*, United States v. Marquez-Gallegos, 217 F.3d 1267, 1270–71 (10th Cir. 2000) (citing U.S. SENTENCING COMM'N, *supra* note 1, § 5K2.0) ("Where the factor in issue is one already taken into account by the applicable Guideline and adjustments, departure from the Guideline is permissible only if that factor is present in a manner or degree unusual enough to distinguish the case from the 'heartland' of cases covered by the Guideline.").

65. *See* U.S. SENTENCING COMM'N, *supra* note 1. The Sentencing Reform Act of 1984, part of the Comprehensive Crime Control Act of 1984, provided for the development of modern guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. *See* 18 U.S.C. §§ 3551, 3553 (2006); U.S. SENTENCING COMM'N, *supra* note 1, § 1, pt. A, subpt. 1. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process. *Id.*

66. The range of an applicable Guidelines sentence for Zone D, which addresses the most serious offenses, spans from twenty to thirty-three percent of the high end of the guideline range. U.S. SENTENCING COMM'N, *supra* note 1, § 5, pt. A. However, the percentage is only a fraction of the range between the statutory minimum and maximum. *See id.*

67. *See* Koh, *supra* note 51, at 1120–21 (1992) (discussing a gamesmanship in gathering information for the court's consideration at sentencing proceedings

prosecutorial discretion undermined the sentencing goals of uniformity and proportionality.[68] The federal sentencing scheme was condemned as overly formulaic, inflexible, and harsh.[69] A change to the mandatory Guidelines may have been unavoidable.

1. Limited Judicial Role in the "Plea and Sentence" Federal System

The district court's limited role in most criminal cases bears on two issues applicable to this article. First, the limited role explains why some judges may abhor policies or practices that rein in their discretion, such as mandatory sentencing schemes and binding plea agreements.[70] Second, because judges are prohibited by statute from having a role in plea negotiations, the parties undertake a bit of a mystery in pursuing a binding plea agreement that must be accepted by the court without knowing the court's standard for acceptance or personal feelings about determinative agreements.[71] The limited judicial role also may best explain why the Court rendered the Guidelines advisory in *Booker*.[72]

Federal district court judges have long presided over a predominantly criminal docket, wherein ninety-five percent of the cases are resolved by guilty plea.[73] After the Supreme Court's

and in pre-sentencing reports); Notes, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 837 (1968) (discussing how the information before the court at sentencing comes almost exclusively from prosecutors, "who cannot be expected to be disinterested").

68. *E.g.*, United States v. Stanley, 928 F.2d 575, 583 (2d Cir. 1991) (noting that because judges are prevented from departing from the Guidelines, discretion is transferred to prosecutors); United States v. Kikumura, 918 F.2d 1084, 1119 (3d Cir. 1990) (Rosenn, J., concurring) (discussing how the Guidelines allow for prosecutors' "manipulation of . . . charge and sentencing").

69. *See* Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 46 (2005) (criticizing sentencing schemes like the Guidelines that guide judges to impose sentences "calculated by means of mechanical scoring systems . . . rather than by looking closely at the circumstances of individual cases").

70. See Michael M. O'Hear, *Plea Bargaining and Procedural Justice,* 42 GA. L. REV. 407, 460–61 (2008).

71. *See* FED. R. CRIM. P. 11.

72. *See* United States v. Booker, 543 U.S. 220, 226, 245 (2005).

73. *See* 2005 ANN. REP. ADMIN. OFFICE OF THE U.S. COURTS tbl.D-4, at 245 (2006), *available at* http://www.uscourts.gov/uscourts/FederalCourts/AnnualReport/2005.pdf (reporting 77,339 convictions, with 74,024 resulting from guilty pleas). "Although reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases." FED. R. CRIM. P. 11 Advisory Comm. Notes, 1974. "The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial." *Id.* at Advisory Comm. Notes, 1966.

decision in *Santabello*,[74] the government and the defense were encouraged to openly negotiate and contract for mutually favorable terms at the time of a guilty plea.[75] Although federal criminal practice was a "plea and sentence" system, district court judges participated in plea discussions and enjoyed true discretion at sentencing.

In the 1970s, Congress, after some debate,[76] decided that in federal court, unlike prior practice and most state court systems, the judge would have no role in plea discussions.[77] Federal Rule of Criminal Procedure 11 (Rule 11) covered the parameters of a guilty plea colloquy with the defendant and clearly delineated the court's limited role in plea negotiations.[78] Congress provided that

74. Santobello v. New York, 404 U.S. 257 (1971).

75. *See id.* at 261–62 ("The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known.").

76. *See* FED. R. CRIM. P. 11 Advisory Comm. Notes, 1974 ("It has been stated that it is common practice for a judge to participate in plea discussions.") (citing D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 32–52, 78–104 (1966)); Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 891, 905 (1964); *cf.* ABA COMM. ON PROF'L ETHICS, INFORMAL OP. C-779 (1965) ("The judge, of course, should not be a party to any arrangements in advance for the determination of sentence whether as a result of a guilty plea or a finding of guilty based on proof.").

77. *See* FED. R. CRIM. P. 11 Advisory Comm. Notes, 1974 (citing ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (Approved Draft 1968)) (introducing subdivision (e)(1) prohibiting the court from participating in plea discussions); Scott v. United States, 419 F.2d 264, 278 (D.C. Cir. 1969) (holding that trial judges should neither participate in plea bargaining nor entice defendants to plead guilty with promises of a lenient sentence). *But see* FED. R. CRIM. P. 11 Advisory Comm. Notes, 2002 (citing United States v. Torres, 999 F.2d 376, 378 (9th Cir. 1993)) (noting the practice and concluding that the presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge and stating that "[t]he Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements.").

78. *See* FED. R. CRIM. P. 11(c)(1) ("The court must not participate in these discussions."); *see also* Virgin Islands v. Walker, 261 F.3d 370, 376 (3d Cir. 2001) (citing Longval v. Meachum, 651 F.2d 818, 821 (1st Cir. 1981)) (stating that "[a] judge who participates in plea bargaining 'is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he has suggested to the defendant."); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (discussing the "unequal positions of the judge and the accused"). *But see* Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able To Participate in Plea Discussions* 3 (John Marshall Law School, working paper series, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672442 (arguing that judicial participation in plea discussions would produce more reasonable plea agreements than those that begin with unnecessarily high initial offers from the

the court must accept or reject guilty pleas and negotiated plea agreements; yet, due to the imbalance of a lifetime-appointed federal judge relative to a criminal defendant, the court shall not be part of the discussion.[79] Presiding over fewer criminal trials and disinvited from plea discussions, the district court served its most important function at sentencing.[80]

Following the introduction of the Guidelines, federal court remained a plea and sentence practice. District court judges still had no role in plea discussions.[81] The mandatory Guidelines reduced sentencing to a ceremony and severely limited the court's role in the phase in which it was most involved. Specific provisions of the Guidelines[82] and the mandatory scheme's predictability further incentivized guilty pleas.[83] Yet the central functions of federal sentencing were outsourced to the Commission for creating the Guidelines[84] and to the U.S. Probation and Pretrial Services for running the initial calculations.[85]

government).

79. *See* FED. R. CRIM. P. 11(c)(1).

80. Many district courts delegate the ministerial duties of handling guilty pleas in federal courts. Some still argue the need for a judicial role in plea bargaining. *See* Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2028–29 (2006) (coining most plea bargaining as "biased and coercive"). It was the potential for judicial coercion that led Congress to carve the court out from its function in federal plea bargaining. *See* FED. R. CRIM. P. 11, Advisory Comm. Notes, 1974.

81. FED. R. CRIM. P. 11(c)(1).

82. The Guidelines codified a preexisting principle in federal criminal practice: if a defendant pleaded guilty and spared the time and resources of a trial, then the system would treat him more favorable at sentencing. *See* U.S. SENTENCING COMM'N, *supra* note 1, § 3E1.1 (rewarding the defendant who "clearly demonstrates acceptance of responsibility for his offense" and further rewarding the defendant who "has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently").

83. "According to the U.S. Department of Justice, 94.1% of federal prosecutors' cases resolved in 2009 ended with a conviction." *Feds' Conviction Rate Bad Sign For Blago*, WLS-TV, Aug. 4, 2010, http://abclocal.go.com/wls/story?section=news/local&id=7593302 (last visited Dec. 19, 2010).

84. *See* 28 U.S.C. § 994(a)(1) (2009).

85. *See* 28 U.S.C. §§ 995(a)(9), 995(a)(18) (2009) (directing the Commission to "monitor the performance of probation officers'" work with the Guidelines and to "devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel" and others).

2. Prosecutorial Discretion

The mandatory Guidelines caused several problems related to prosecutorial discretion. First, the mandatory Guidelines significantly limited the federal prosecutor's discretion at sentencing.[86] Second, the Guidelines could not address the lack of uniformity in the few decisions that remained within the discretion of the prosecutor.[87] Lastly, the mandatory sentencing scheme exacerbated abuses of prosecutorial discretion[88] and, in turn, government discretion sometimes undermined the sentencing goals of uniformity and proportionality.[89]

The mandatory Guidelines, along with DOJ protocol,[90] limited

86. After indictment and plea or trial, the federal prosecutor is confined to the same narrow Guidelines range based upon the offense conduct charged and the criminal history of the defendant. *See* Memorandum from Attorney Gen. John Ashcroft on Dep't Policy and Procedures Concerning Sentencing Recommendations and Sentencing Appeals to All Federal Prosecutors (July 28, 2003) [hereinafter Ashcroft July 2003 Memo], *available at* http://www.nacdl.org/public.nsf/legislation/ci_03_32/$FILE/AG_Guidance_Stcg_Recs.pdf (requiring prosecutors to recommend a sentence to the court within the Guidelines and to oppose all motions for downward departure filed by the defendant or by the court *sua sponte*).

87. *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIRCUIT REV. 1 (2009) (discussing prosecutorial discretion as the central component in federal criminal practice, yet not subject to judicial review); *cf.* Gleeson, *supra* note 22, at 639 (advocating for binding plea agreement determinations to be matters within prosecutorial discretion).

88. The Guidelines treated all offense conduct mathematically, even if the charges arose from abuses of prosecutorial discretion. *See, e.g.*, United States v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001) (considering vindictive prosecution claims occurring after the defendant exercises his right to appeal).

89. *See infra* notes 102, 106 (describing instances when prosecutorial discretion served to negotiate the guidelines, as opposed to operate within them).

90. *See* Ashcroft July 2003 Memo, *supra* note 86 (setting out the policies and procedures for sentencing recommendations, hearings, and appeals); Memorandum from Attorney Gen. James Comey on Dep't Policies and Procedures Concerning Sentencing to All Federal Prosecutors (Jan. 28, 2005) [hereinafter Comey 2005 Memo], *available at* http://www.kilpatrickstockton.com/~/media/Files/Comey%20Memo%202005.ashx (echoing similar guidance); *cf.* Memorandum from Attorney Gen. Eric Holder on Dep't Policy on Charging and Sentencing to All Federal Prosecutors (May 19, 2010) [hereinafter Holder 2010 Memo], *available at* http://lawprofessors.typepad.com/files/holdermemo.pdf (discussing rare cases in which sentences outside of the Guidelines may be appropriate); *see also* the PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003) (directing the Sentencing Commission to review the grounds for downward departure); Memorandum from Attorney Gen. John Ashcroft on Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing to All Federal Prosecutors (Sept. 22, 2003) [hereinafter Ashcroft

traditional prosecutorial discretion at sentencing. Once the wheels of justice were set in motion upon charging, the defendant's fate did not rest with the prosecutor.[91] The Guidelines produced a narrow sentencing range and, like the judiciary, the prosecutor's discretion was similarly confined. The DOJ required that federal prosecutors mechanically argue for "guideline sentences" and defend against all other attempts by the defense or the judiciary to deviate.[92]

The DOJ sought to regulate decisions that traditionally rested in the discretion of the prosecutor.[93] In 2003, Attorney General John Ashcroft distributed a memorandum that standardized some prosecutorial discretion by requiring the government to argue for "guideline sentences."[94] The memorandum also required the government to oppose all defense motions for lower sentences[95] and report when district court judges imposed sentences below the

September 2003 Memo], *available at* http://www.crimelynx.com /ashchargememo.html (directing, in a section entitled "Sentence Bargaining," that "[t]here are only two types of permissible sentence bargains. . . . Sentences within the Sentencing Guidelines range . . . [and] Departures"). Attorney General Ashcroft stated, in the September 2003 Memo, "Congress has made clear its view that there have been too many downward departures from the Sentencing Guidelines, and it has instructed the Commission to take measures 'to ensure that the incidence of downward departures [is] substantially reduced.'" Ashcroft September 2003 Memo.

91. *See infra* Part IV.C (discussing how the constitutional holding in *Booker* could have given greater discretion to the federal prosecutor, as opposed to the district court); United States v. Booker, 543 U.S. 220, 246 (2005) (discussing how the prosecutor through plea negotiations could determine which factors would be before the district court at sentencing); *cf.* O'Sullivan, *supra* note 45, at 1414–17 (defending the Guidelines' structure as unlikely to allow abuse of prosecutorial discretion to adversely affect its goals of uniformity and proportionality).

92. *See infra* notes 93–95 (describing how DOJ and then Attorney General John Ashcroft restricted discretion and called for standardized responses to defense and judicial activity in opposition).

93. *See* Ashcroft July 2003 Memo, *supra* note 86 (telling all Department attorneys they must adhere to the Department's policies and procedures for sentencing recommendations, hearings, and appeals); Comey 2005 Memo, *supra* note 90, at 1 (stating "we must take all steps necessary to ensure adherence to the Sentencing Guidelines"); Holder 2010 Memo, *supra* note 90, at 1.

94. *See* Ashcroft July 2003 Memo, *supra* note 86, at 2 ("Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant's conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.").

95. *See id.* at 3; *see also* the PROTECT ACT, § 401(m)(2)(A), 117 Stat. at 675 (aiming at reducing the prevalence of downward departures from the Guidelines).

guideline range.[96] The Department's message was clear: the fewer incidents of prosecutorial discretion, and the greater deference to the Guidelines, the better.

Partly *because of* the mandatory Guidelines, the government sometimes resorted to loopholes in the Guidelines to resolve cases. For example, some prosecutors treated statutory enhancements improperly as matters within their discretion.[97] Federal prosecutors did not react uniformly in striking pre-indictment arrangements with defendants and witnesses, or when filing *restated charges* in conjunction with a plea agreement.[98] U.S. Attorney's offices throughout the country had very different standards when declining criminal prosecutions, deciding plea agreements, deciding whether to file a motion for downward departure for "substantial assistance" and, once filed, recommending a sentencing reduction to the court.[99] When mandatory, the Guidelines invited impropriety and disparate treatment in these areas.[100]

96. *See* Ashcroft July 2003 Memo, *supra* note 86, at 3–4 (encouraging the opposition of defense motions for downward departure and government appeals of adverse decisions); ATTORNEY'S MANUAL, *supra* note 54, at 9-2:170(b) (authorizing appeals).

97. *See* Ashcroft September 2003 Memo, *supra* note 90, at 2 (discussing the lack of uniformity in application of statutory enhancements). Attorney General Ashcroft addressed the widely known practice of declining to seek "readily provable" statutory enhancements in conjunction with a guilty plea. *Id.* The Memo specifically cites two of the most common abuses of the time, the "filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases." *Id.*

98. *Id.* (discussing the lack of uniformity in "post-indictment reassessment" or the practice of refiling less serious charges in conjunction with a plea agreement). In cases where post-indictment circumstances cause a prosecutor to determine in good faith that the most serious offense is not readily provable because of a change in the evidence or some other justifiable reason (*e.g.*, the unavailability of a witness or the need to protect the identity of a witness until he testifies against a more significant defendant), the prosecutor may dismiss the charge(s) with the written or otherwise documented approval of an Assistant Attorney General, United States Attorney, or designated supervisory attorney. *Id.*

99. *See* George C. Harris, *supra* note 60, at 9 (comparing so-called "cooperation agreements" to government bribery); Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 200 (1997) ("The prosecutor now is more of a concierge, directing which defendants may enter the household and which rooms they may visit.").

100. *See* Gleeson, *supra* note 22, at 648–49 (discussing binding plea agreements that were below board so as to avoid the Guidelines unworkable policy statement in Section 6B1.2).

As it relates to this article, the mandatory Guidelines also affected the prosecutor's discretion to entertain binding plea agreements in federal court. In a 2008 law review article, Judge John Gleeson, while presiding in the Eastern District of New York, argued that the Guidelines curbed prosecutorial discretion in the area of binding plea agreements.[101] There are several reasons why a prosecutor may want to enter into a binding plea agreement, as Congress intended under Rule 11, for a lower sentence than the judge may impose.[102]

For example, agreeing to a shorter sentence may be appropriate when there is a risk of acquittal at trial, priorities lie with other cases and investigations, sparing the victim the experience of trial,[103] or, as discussed below, a conviction and an admission of guilt are more important than a particular sentence.[104] The mandatory Guidelines instead dictated plea discussions, leaving little room for *the government's opinion* about an appropriate sentence,[105] much less a "milk of human kindness."[106]

Abuses of prosecutorial discretion, such as bringing the wrong case, targeting the wrong defendants, or bringing a case for the wrong reasons were similarly destined for a dispassionate, overly formulaic, and harsh result.[107] The subset of criminal cases that most incensed judges at sentencing were actually abuses of prosecutorial discretion.[108] Once the Guidelines neutered binding

101. *Id.* at 640–41 (stating that "the Commission has attempted to strip prosecutors of a power they have had for more than half a century"—the power to negotiate and enter into binding plea agreements).

102. *Id.* at 640.

103. *Id.*

104. *See supra* Part V.C (discussing the Enron prosecution of the three British bankers who pled guilty pursuant to binding plea agreements); *see also* Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 941–42 (2003) (praising the Guidelines' uniform and unbiased treatment of white collar crime cases).

105. *See supra* notes 86–91 and accompanying text (discussing DOJ protocol during the Guidelines era).

106. *See* Gleeson, *supra* note 22, at 640 ("Sometimes, believe it or not, prosecutors simply reveal the milk of human kindness and negotiate a lesser sentence because it seems fair in the circumstances.").

107. The traditional and separate decisions to investigate, charge, offer a plea, accept an offer to plea, insist on specific terms of a plea agreement, dismiss, offer a lesser offense or lesser sentence (with or without cooperation), and negotiate a lesser charge or lesser sentence were combined into only a narrow set of actual decisions. Once indicted, prosecutorial discretion, like judicial discretion, in a criminal case narrowed significantly under the Guidelines.

108. "Congress did not create the Sentencing Commission with an eye toward

plea agreements,[109] it also encouraged *sub rosa* deals, fact-bargaining, and improper pre-agreement ratification by the court.[110] This stigma stays with Rule 11(c)(1)(C) plea agreements today and possibly poses the greatest challenge to implementing any of the proposals in Part VI of this article.

3. Lack of Individualization at Sentencing

Sentencing proceedings under the mandatory Guidelines reflected more computation than consideration or compassion. The Guidelines reduced sentencing to a mathematical exercise and left minimal room for advocacy or judgment.[111] From the defendant's perspective, it was not unusual for a defendant to first meet his or her sentencing judge on the day of sentencing. Expecting a speech, lecture, or modicum of human compassion, the defendant was forced to endure a painful recitation of applicable guideline provisions and calculations and, at last, a range of months representing the narrow window of his eventual sentence.

Because the court was not permitted to consider many individual characteristics and life circumstances at sentencing,[112] the tone of the proceeding similarly steered elsewhere. Information about the person before the court at sentencing appeared in the presentence report and the court may have even "adopted" the information as its "factual findings"; yet, these matters were secondary to the math. Instead of any true

eradicating prosecutorial abuses . . ." United States v. LaBonte, 70 F.3d 1396, 1408 (1st Cir. 1995), *cert. granted*, 518 U.S. 1016 (1996). Many of the anecdotal accounts of the mandatory Guidelines' constraint on the court at sentencing were actually cases that should not be in federal court, punishable as a felony, or were worthy of a downward departure not filed.

109. *See infra* Part III.B (discussing how binding plea agreements were "meaningless" under the mandatory Guidelines).

110. *See* Gleeson, *supra* note 22, at 642 n.10, 648–49 (discussing binding plea agreements that were sent underground by the Guidelines).

111. *See supra* note 62. The Guideline range is structured as a fractional percentage of the high end of the range.

112. *See, e.g.*, U.S. SENTENCING COMM'N, *supra* note 1, §§ 5H1.1–.16 (listing individual characteristics and circumstances that are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, such as: age; education and vocational skills; mental and emotional conditions; physical condition, including drug or alcohol dependence or abuse; gambling addiction; employment record; family ties and responsibilities; dependence upon criminal activity for a livelihood; race, sex, national origin, creed, religion, and socioeconomic status; and lack of guidance as a youth).

compassion, sympathy, or guidance from the court, the sentencing proceeding was less about the defendant, his or her life, and other circumstances and more about the Guidelines and its calculations.

III. MANDATORY GUIDELINES EFFECTIVELY REPLACED BINDING PLEA AGREEMENTS

A. Binding Plea Agreements Under Federal Rule of Criminal Procedure 11(c)(1)(C)

Federal Rule of Criminal Procedure 11 governs plea agreements and the individual defendant's rights when pleading guilty to a federal offense.[113] Rule 11 forms the minimum requirements for the district court's plea colloquy with a defendant.[114] Congress, in promulgating Rule 11, included provisions encouraging specific terms in plea agreements.[115] Originally enacted as Rule 11(e),[116] Rule 11(c) "establishe[d] a plea agreement procedure . . . [which] permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case."[117] Rule 11(e)(1), added with the 1974 amendments, and later changed to Rule11(c)(1),[118] included language about plea agreement provisions for negotiated outcomes, including "specific

113. *See* FED. R. CRIM. P. 11; *see also* 24 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE: CRIMINAL PROCEDURE § 611.02 (3d ed. 2010) (describing how Rule 11 legitimizes and controls plea bargaining process); *c.f.* FED. R. CRIM. P. 20.

114. *See* FED. R. CRIM. P. 11(b)(1) (addressing requirements a court "must" discuss with a defendant "[b]efore the court accepts a plea").

115. FED. R. CRIM. P. 11(c)(1)(B)–(C). Also included in the legislation amending Rule 11 were provisions for negotiated, joint sentencing recommendations. *See id.* at 11(c)(1)(B). The district court, as with any recommendation from the parties, could accept or reject the recommendation. As it relates to this article, joint sentencing "recommendations" to the court under Rule 11(c)(1)(B) do not affect the predictability of sentencing because they are nonbinding. The certainty of an outcome is no more defined when two parties, as opposed to one, recommend a result, yet the decision maker is free to ignore the recommendation. For these reasons, this article focuses only on a renewed role for binding plea agreements under Rule 11(c)(1)(C).

116. *See* Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. Law No. 94-64, 89 Stat. 370, 372 (1975).

117. FED. R. CRIM. P. 11, ADVISORY COMM. NOTES (1975).

118. *See* FED. R. CRIM. P. 11, ADVISORY COMM. NOTES (1974) ("Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.").

sentences or sentencing ranges."[119]

Congress encouraged parties in a criminal case to negotiate and contract for a definitive sentence in Rule 11(c)(1)(C), which reads as follows: "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)."[120] The parenthetical further distinguishes the binding plea agreement from the joint recommendation plea agreement in Rule 11(c)(1)(B), which the court could consider or ignore, without recourse for the defendant.[121]

The procedural hurdle to the binding plea agreement was, and still is, the sentencing judge's acceptance of the agreement.[122] The court accepts a binding plea agreement in a separate, and often later, act from accepting the guilty plea.[123] Accepting a guilty plea involves exploring the factual basis for the conviction, whereas accepting a binding plea agreement involves more of a value judgment about the deal.[124]

119. FED. R. CRIM. P. 11(c)(1)(C) (stating that a plea agreement may set forth "a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply"); *see also* United States v. Silva, 413 F.3d 1283, 1283 (10th Cir. 2005) (describing that parties stipulated to a particular sentencing range, rather than a specific sentence, in a binding plea agreement).

120. FED. R. CRIM. P. 11(c)(1)(C).

121. *See id.*

122. FED. R. CRIM. P. 11, ADVISORY COMM. NOTES (1975). The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it. *Id.* The government and the defendant are the parties to the plea agreement. The court's role is not to modify but only to accept or reject. Once the court accepts a plea agreement, however, it too is bound by the terms. *See* Perez v. State, 866 N.E.2d 817, 820 (Ind. Ct. App. 2007), *transfer denied*, (July 25, 2007).

123. *See* United States v. Hyde, 520 U.S. 670, 674 (1997) (holding that "[g]uilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time"). The Commentary to section 6B1.2 of the Guidelines, in fact, encouraged the judiciary to defer acceptance of a binding plea agreement until after U.S. Probation had prepared its presentence report. U.S. SENTENCING COMM'N, *supra* note 1, § 6B1.2 cmt.

124. *Compare* FED. R. CRIM. P. 11(b), *with* FED. R. CRIM. P. 11(c)(3)(A) (describing the court's discretion to accept or reject a binding plea agreement). *See also infra* note 219 (discussing the appellate courts' "reasonableness" review);

The standard for the district court's acceptance of a binding plea agreement, importantly, has dictated its role in federal criminal practice.[125] Rule 11 and its advisory notes are silent as to the standard for accepting binding plea agreements.[126] Before the Guidelines, district courts accepted binding plea agreements if the "specific sentence" comported with the district judge's own sense of a just and fair result.[127] In essence, the parties enjoyed the same discretion to contract for an appropriate sentence as the judge had to impose one.[128]

Part VI (proposing a new standard for judicial acceptance of binding plea agreements that mirrors the procedural and substantive components of the appellate courts "reasonableness" review of imposed sentences).

125. *See* FED. R. CRIM. P. 11(c)(3)(A) (describing the court's discretion to accept or reject a binding plea agreement). *But see* FED. R. CRIM. P. 11(b)(3) (prohibiting the court from accepting a binding plea agreement without confirming that the plea has a factual basis)*;* FED. R. CRIM. P. 11, *supra* note 117. Rule 11(e) established a plea agreement procedure, which permits the parties to discuss "disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it." *Id.*

126. Rule 11(e), later revised to Rule 11(c), was silent about the standard for the court to apply when deciding to accept a binding plea agreement. *See* FED. R. CRIM. P. 11, ADVISORY COMM. NOTES ("Amendments have been made to Rule 11(e)(1)(B) and (C) [later revised to Rule 11(c)(1)(B) and (C)] to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements . . . ."). Under Rule 11(e)(3), later revised to Rule 11(c)(4), the rule states that, "[i]f the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment." FED. R. CRIM. P. 11(c)(4).

127. *See, e.g.*, United States v. Navedo, 516 F.2d 293, 297 (2d Cir. 1975) (finding acceptance or rejection of any Rule 11 plea agreement reviewed for abuse of discretion). Cases decided during the Guidelines era disregarded the Guidelines' policy statement in section 6B1.2 and its commentary and applied a common sense definition of "justifiable reasons" for a binding plea agreement. *See, e.g.*, United States v. Hyde, 520 U.S. 670, 676 (1997) (stating that the "fair and just reason" applies to 11(c)(1)(C) plea agreement acceptance); United States v. Bernard, 373 F.3d 339, 344–45 (3d Cir. 2004) (holding that the parties' agreement to a sentence outside of the Guidelines, but without clear departure authority, was "justifiable"); United States v. Coney, 390 F. Supp. 2d 844, 850 (D. Neb. 2005) (accepting an 11(c)(1)(C) plea agreement, even where the sentence fell outside of the Guideline range, when premised upon "justifiable reasons").

128. Courts have long recognized that plea agreements are subject to the law of contracts, particularly for standards of interpretation. *See* United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979) (stating that "[p]lea bargaining . . . though a matter of criminal jurisprudence, is subject to contract-law standards"); *see also* Scott & Stuntz, *supra* note 18.

B. Binding Plea Agreements Meaningless Under the Guidelines

Ironically, it was a Guidelines policy statement and its commentary about judicial acceptance of the binding plea agreements that chilled use of binding plea agreements during the Guidelines era,[129] and still do today.[130] The Guidelines recommended that the court defer acceptance of the binding plea agreement until the court has reviewed the pre-sentence report.[131] After more than a decade and without any need to do so, the Commission elected to set forth a new, self-interested standard for judicial acceptance of binding plea agreements.[132] Section 6B1.2(c) of the Guidelines stated, beginning in 1987, that with a binding plea agreement "the court may accept the agreement if the court is satisfied either that: . . . the agreed sentence is within the applicable guideline range; or . . . the agreed sentence departs from the applicable guideline range ***for justifiable reasons*** . . . ."[133]

In an early 1989 amendment to the Commentary for Section 6B1.2 and again without any need to do so, the Commission unilaterally defined "justifiable reasons."[134] The Guidelines stated that

> the court should accept a . . . specific sentence *only* if the court is satisfied either that such sentence is . . . within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable

129. When promulgated, Rule 11(e)(1), later revised to Rule 11(c)(1), explicitly permitted plea agreements between the government and a defendant and, according to the Second Circuit, "specifically provide[d] for possible *concessions* that the government may make in a plea agreement, in addition to reduction of the charge to a lesser or related offense." United States v. Burruezo, 704 F.2d 33, 37 (2d Cir. 1983) (citing FED. R. CRIM. P. 11, ADVISORY COMM. NOTES (1976)) (emphasis added).

130. *See infra* Part VI (advocating for Congress to amend Rule 11 or the Commission to redraft the applicable Guidelines' policy statements).

131. *See* U.S. SENTENCING COMM'N, *supra* note 3, § 6B1.1(c) cmt.

132. *See Id.*; *see also* Gleeson, *supra* note 22, at 645–46 (calling the policy statement governing the acceptance of binding plea agreements a "defect" and criticizing the Commission's implementation of important change through its commentary).

133. U.S. SENTENCING COMM'N, *supra* note 1, § 6B1.2(c) (2009), *available at* http://www.ussc.gov/Guidelines/2009_guidelines/Manual/GL2009.pdf (emphasis added). The policy statement provided the flexibility for parties to enter into meaningful plea agreements as Congress intended under Rule 11(c); it allowed parties to agree to, and judges to accept, a favorable sentence for a defendant based upon "justifiable reasons" in subsection (2) and *without regard for* the "applicable guideline range" in subsection (1). *Id.*

134. *See* U.S. SENTENCING COMM'N, *supra* note 3, § 6B1.2 cmt.

> reasons (*i.e.*, that such departure is authorized by 18 U.S.C. § 3553(b) [the mandatory Guidelines]).[135]

The Commentary continued by stating that "the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement . . . ."[136]

In sum, according to the Guidelines' policy statement, the court shall only accept binding plea agreements if the court could have imposed the specific sentence in *its limited discretion*.[137] Some courts did not consider *this* policy statement in Section 6B1.2 as mandatory or binding.[138]

The DOJ[139] also held back the important function of binding plea agreements and chilled prosecutors from using them for more than twenty years.[140] Through its alignment and allegiance to the

135. *Id.* (emphasis added). The comment continued to explain that "those reasons are specifically set forth in writing in the statement of reasons or the judgment and commitment order. As set forth in subsection (d) of § 5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense." *Id.*

136. *Id.*

137. *See id.*; *see also supra* notes 63–65 (discussing the district court's narrow departure authority); *supra* notes 88–94 (discussing prosecutorial discretion and departures from sentences under the Guidelines); *infra* notes 139–41 (discussing the PROTECT Act and DOJ protocol calling for fewer downward departures and fewer instances of below-Guidelines sentences).

138. *See* United States v. Goodall, 236 F.3d 700, 704 (D.C. Cir. 2001) ("Plea agreements can retain their authority to bind the government, the defendant and the district court even when they provide for sentences that depart from the prescriptions of the guidelines.") (citation omitted); United States v. Gilchrist, 130 F.3d 1131, 1134 (3d Cir. 1997) ("An 11(e)(1)(C) plea agreement, once accepted, binds the district court notwithstanding departures from the applicable guidelines.").

139. *See* PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(A), 117 Stat. 650, 675 (2003); Ashcroft September 2003 Memo, *supra* note 90. In a memorandum following Congress's passage of the PROTECT Act and in a section entitled "Sentence Bargaining," Attorney General Ashcroft directed federal prosecutors that sentences may only be reduced via the sentencing guidelines range or departures. *See* Ashcroft July 2003 Memo, *supra* note 86, at 1. The Department of Justice echoed the Guidelines' policy statements and further discouraged binding plea agreements in federal practice. *See supra* Part II.C (discussing DOJ protocol and the guidance from the Attorney Generals under the Guidelines). In sum, DOJ functionally prohibited federal prosecutors from contracting for a sentence not called for by the Guidelines. *Id.*

140. *See* Ashcroft September 2003 Memo, *supra* note 90. Attorney General Ashcroft stated,

> [F]ederal prosecutors must not request or accede to a downward departure except in the limited circumstances specified in this

Guidelines, the DOJ implicitly prohibited federal prosecutors from agreeing to specific sentences below the Guidelines.[141] Federal prosecutors, pursuant to the Attorney General's memoranda, were to argue for a Guidelines sentence, oppose motions for a below-Guidelines sentence, and report instances when a court imposed a below-Guidelines sentence.[142] To enter into a binding plea agreement as Congress intended under Rule 11, one that offers the defendant a lower sentence, the prosecutor would have to contravene the Attorney General's directive and, if the agreement was accepted, report the judge.

Some district courts disfavored binding plea agreements during the mandatory Guidelines era, even as seldom as they were used.[143] The few binding agreements that surfaced during the mandatory Guidelines era derived from one of the following interpretations: Rule 11 trumps the Guidelines' policy statements;[144] Rule 11 provides for the nonapplicability of

> memorandum and with authorization from an Assistant Attorney General, United States Attorney, or designated supervisory attorney. Likewise, except in such circumstances and with such authorization, prosecutors may not simply stand silent when a downward departure motion is made by the defendant. *Id.*

141. *See* Ashcroft July 2003 Memo, *supra* note 86, at 3. Attorney General Ashcroft reiterated DOJ's protocol to combat all downward departure motions and addressed binding plea agreements specifically, "if the agreement is for a specific sentence under Rule 11(c)(1)(C), the agreement must not vitiate relevant provisions of the Sentencing Guidelines." *Id.*

142. Ashcroft September 2003 Memo, *supra* note 90.

143. *See, e.g.*, United States v. Seidman, 483 F. Supp 156, 158 (E.D. Wis. 1980) ("At the outset, the Court would note that it never will accept a Rule 11(e)(1)(C) type plea agreement. It is this Court's prerogative to determine the type of sentence that should be imposed upon a defendant for the offense of which he or she has been adjudged guilty."); *cf.* United States v. Coney, 390 F. Supp. 2d 844, 845 (D. Neb. 2005) ("When such a plea agreement smells too much like cow manure siphoned from a feedlot after a swampy, summer rain, judges should not pretend the odor is lilac. On the other hand, if the plea agreement stinks, but the stench is more like kitty litter than cow manure, a judge should hold his or her nose and move on. The trick is to discern the difference.").

144. Cases decided during the Guidelines era disregarded the Guidelines' policy statement in Section 6B1.2 and its commentary and applied a commonsense definition of "justifiable reasons" for a binding plea agreement. *See, e.g.*, *Coney*, 390 F. Supp. 2d at 850 (accepting an 11(c)(1)(C) plea agreement, even where the sentence fell outside of the Guidelines range, when premised upon "justifiable reasons"); United States v. Bernard, 373 F.3d 339, 344–347 (3d Cir. 2004) (holding that the parties' agreement to a sentence outside of the Guidelines, but without clear departure authority, was "justifiable"); United States v. Hyde, 520 U.S. 670, 676 (1997) ("fair and just reason" applies to 11(c)(1)(C) plea agreement acceptance).

Guidelines' provisions, including Section 6B1.2 and its commentary, which discouraged binding plea agreements;[145] or the sentiment that with the parties and court in agreement as to an appropriate sentence, there was no one left to challenge a downward deviation from the Guidelines range.

IV. THE GAME CHANGER OF *UNITED STATES V. BOOKER*

Prior to 2005, the mandatory Guidelines constrained federal district courts' sentencing discretion for nearly twenty years.[146] *Booker* rendered the Guidelines "advisory" and restored discretion to the trial courts at sentencing.[147] District courts now sentence individual defendants according to policy statements, a "consultation" of the Guidelines, and generalized notions of fairness, consistency, and the interests of justice.[148] The effect of the Court's remedy in *Booker* was unrelated to the constitutional challenge upon which review was granted.[149] The effect of *Booker*, however, is progressive and dramatic.

A. The Gradual Constitutional Challenge to Judicial Fact Finding at Sentencing

For all of the criticism of the Guidelines as mandatory, overly formulaic, or impersonal, it was a Sixth Amendment challenge to a judge's findings of sentencing enhancements by a lesser standard of proof that rendered the Guidelines "advisory" in *Booker*.[150] The line of cases began in the 1990s and surfaced every few years, causing some havoc in federal practice.[151] The constitutional

145. *See* FED. R. CRIM. P. 11(c)(1) (stating that the parties may agree to the nonapplicability of Guidelines' provisions). While there is no reported case that states that the binding plea agreement included an agreement about the nonapplicability of the policy statement about accepting a binding plea agreement in Section 6B1.2, it is feasible.

146. *See* United States v. Booker, 543 U.S. 220, 226 (2005).

147. *See id.*

148. *See id.* at 246–47; *see also infra* Part IV.B (discussing the incongruent remedy in *Booker* and how the constitutional violations could have been entrusted to prosecutorial discretion).

149. *See infra* Part IV.B (discussing the incongruent remedy in *Booker*).

150. *Booker*, 543 U.S. at 245–46; *see also* James L. Buchwalter, Annotation, *Construction and Application of Sixth Amendment Right to Trial by Jury—Supreme Court Cases*, 6 A.L.R. FED. 2D 213 (2005).

151. *See, e.g.*, Jones v. United States, 526 U.S. 227, 242 (1999) (discussing the Sixth Amendment concerns raised in *McMillan* as it "broached the potential constitutional significance of factfinding that raised the sentencing ceiling");

challenge did not relate to the *substance* of the mandatory Guidelines or its effect on a particular class of defendants.[152] Instead, the challenge concerned the *process*[153] employed by district court judges in making findings of fact in accordance with the Commission's formula.[154] The eventual remedy in *Booker*, as discussed below, bears no relation to these procedural challenges.[155]

The constitutional challenge and analysis turned on determinations of elements versus "sentencing factors."[156] An indictment must set forth each element of the crime that it charges and the government must then prove each element beyond a

McMillan v. Pennsylvania, 477 U.S. 79, 81 (1986) (recognizing a Sixth Amendment right to jury determination of all "ultimate facts concerning the offense committed"); *cf.* Almendarez-Torres v. United States, 523 U.S. 224, 228–47 (1998) (distinguishing between elements of crimes and sentencing factors).

152. *See infra* Part VI.A (discussing the gradual constitutional challenge that culminated in the Court's decision in *Booker* and the remedy of the "advisory Guidelines").

153. *See infra* Part VI.A. In cases that went to trial during the mandatory Guidelines era, juries in most federal criminal trials were asked to return verdicts of guilt based upon the government's proof of the elements of a crime only. They typically did not, at the time of the verdict using the beyond a reasonable doubt standard, render additional findings related to aggregating factors related to the offense, conduct, or the defendant's background. The line of cases in the developing constitutional challenge to this *process* that culminated with *Booker* addressed the right to have the jury decide, in addition to elements, the applicable sentencing enhancements in the Guidelines using the beyond a reasonable doubt standard in criminal cases. *See infra* Part IV.A.

154. U.S. SENTENCING COMM'N, *supra* note 1. *See supra* Part II (discussing the complex formula and mathematical complexity of the Guidelines). In practice, the district court judge would enter a finding related to these enhancements at sentencing under a preponderance of the evidence standard. For example, in a fraud case that went to trial, the government may have proved and the jury returned a verdict of guilty on wire fraud, a scheme to defraud carried out through the use of an interstate wire. For illustration, the offense of conviction carries with it applicable Guidelines enhancements based upon the amount of money at issue in the fraud and the number of victims impacted. The government was not required to and may not have presented evidence of these potential enhancements at trial. The district judge at sentencing would then decide whether a Guidelines enhancement applied, whether presented at trial or not, using a preponderance of the evidence standard.

155. *Booker*, 543 U.S. at 246–47. *See infra* Part IV.B (discussing the incongruent remedy in *Booker*).

156. *McMillan*, 477 U.S. at 79 (among the first cases in which the Court used "sentencing factor" to refer to a fact that was not found by the jury but could affect the sentence imposed by the judge); *see also* Buchwalter, *supra* note 150, § 14 (discussing cases where no Sixth Amendment right to jury trial held for "sentencing factors").

reasonable doubt in a criminal case.[157] Conversely, the government need not set forth factors relevant only to the sentencing of a defendant who is convicted of the charged crime, and it need not present evidence at trial in support of the enhancement.[158] Congress, over time, began to clearly establish its legislative intent to promulgate sentencing factors instead of additional elements and new crimes.[159] The Supreme Court devoted several cases leading up to *Booker* sorting out elements from sentencing factors and the process of increasing a defendant's exposure for the first time at sentencing.[160]

In 1998, in *Almendarez-Torres v. United States*,[161] the Court reiterated Congress's power to draft sentencing factors and the district court's ability to enhance a defendant's sentence based upon a sentencing factor.[162] In *Almendarez-Torres*, the Court held that a sentencing factor based upon the defendant's recidivism in an illegal reentry prosecution was a penalty provision that authorized an enhanced sentence.[163] Because it did not create a separate crime, the government was not required to allege the earlier conviction in the indictment or prove it at trial beyond a reasonable doubt.[164]

157. *See* Hamling v. United States, 418 U.S. 87, 117 (1974).

158. United States v. Almendarez-Torres, 523 U.S. 224, 228 (1998) ("An indictment must set forth each element of the crime that it charges." (citing *Hamling*, 418 U.S. at 117)); *see also* Staples v. United States, 511 U.S. 600, 604 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." (quoting Liparota v. United States, 471 U.S. 419, 424 (1985))); *McMillan*, 477 U.S. at 84–91 (holding that indictments need not set forth sentencing factors, as the question of sentencing factors versus crime elements are normally a matter for Congress).

159. *Staples*, 511 U.S. at 604. *But see McMillan*, 477 U.S. at 84–91 (setting limits of Congress's power to determine elements versus sentencing factors).

160. *See* Buchwalter, *supra*, note 150 (compiling and distinguishing the Court's cases related to judicial fact-finding and the defendant's Sixth Amendment right to a jury trial).

161. 523 U.S. 224 (1998).

162. *Almendarez-Torres*, 523 U.S. at 228 ("Within limits, the question of [sentencing factors versus elements of crimes] is normally a matter for Congress." (citing *McMillan*, 477 U.S. at 84–91)); *see also Staples*, 511 U.S. at 604 (definition of a criminal offense entrusted to the legislature, "particularly in the case of federal crimes, which are solely creatures of statute" (quoting Liparota v. United States, 471 U.S. 419, 424 (1985))).

163. *See Almendarez-Torres*, 523 U.S. at 226–27.

164. *Id.* at 226 ("[I]f the provision simply authorizes an enhanced sentence when an offender also has an earlier conviction, then the indictment need not mention that fact, for the fact of an earlier conviction is not an element of the

In *Jones v. United States*[165] in 1999, the Court reached the exact opposite result in analyzing the enhancements related to aggravating circumstances within the offense conduct.[166] The *Jones* court again distinguished between elements of the offense that must be alleged in the indictment and proved at trial, as compared to "sentencing factors" which could be first addressed at sentencing.[167] The Court's analysis focused on the statute at issue, the notice afforded to a defendant by the offense charged in the indictment, and the maximum punishment for the offense.[168] In *Jones,* the Court held that the federal carjacking statute set forth not sentencing factors, but three separate offenses with additional elements that must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.[169]

Next, in *Apprendi v. New Jersey*[170] in 2000, the Court considered a sentencing factor that enhanced, or could potentially enhance, a defendant's sentence above the maximum punishment of the offense charged in the indictment and proved at trial.[171] The government indicted Apprendi in New Jersey state court for a gun violation that carried a five-to-ten year maximum punishment.[172] After Apprendi pleaded guilty, the prosecutor filed a motion to enhance the sentence under the state's hate crime statute, and the court found by a preponderance of the evidence that the shooting was racially motivated and sentenced Apprendi to a twelve-year term on the firearms count.[173] By contrast, in *Almendarez-Torres*, the sentencing factor of recidivism increased the potential sentence for the defendant, but the resulting enhanced sentence remained

present crime.").

165. 526 U.S. 227 (1999).

166. *Id.* at 235 ("Here, [as opposed to *Almendarez-Torres*], the search for comparable examples more readily suggests that Congress had separate and aggravated offenses in mind when it employed the scheme of [the relevant statutes].").

167. *Id.* at 232 ("Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." (referencing Hamling v. United States, 418 U.S. 87, 117 (1974)); United States v. Gaudin, 515 U.S. 506, 509–10 (1995))).

168. *Jones*, 526 U.S. at 230–31.

169. *Id.* at 231–32.

170. 530 U.S. 466 (2000).

171. *Id.* at 468–69.

172. *Id.* at 469–71.

173. *Id.* at 470–71.

below the statutory maximum for illegal reentry.[174] In *Apprendi*, the Supreme Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction (the *Almendarez-Torres* exception), must be submitted to a jury and proved beyond a reasonable doubt.[175]

On June 24, 2004, the Supreme Court decided *Blakely v. Washington*,[176] invalidating a sentence imposed under the State of Washington's mandatory sentencing guideline system. The Supreme Court held that the Washington Guidelines violated the defendant's Sixth Amendment right to trial by jury.[177] The government requested Blakely receive a standard-range sentence under a plea agreement, but the judge imposed a harsher punishment based on an enhancement not presented in the charging papers yet found by the court at sentencing.[178] In *Blakely*, the Court correctly interpreted the rule in *Apprendi* to define "maximum punishment" as the maximum sentence a judge may impose solely on the elements of the offense found by the jury, not as the maximum sentence based on additional findings used at the sentencing stage to increase the maximum punishment.[179]

The Court in *Jones*, *Apprendi*, and *Blakely* struck down the higher sentence imposed by the trial court and classified the enhancement at issue as an element that must have been proved at

174. Almendarez-Torres v. United States, 523 U.S. 224, 243–44 (1998).

175. Apprendi v. New Jersey, 530 U.S. 466, 496 (2000) (distinguishing *Almendarez-Torres* on the basis that recidivism "does not relate to the commission of the offense" itself).

176. 542 U.S. 296 (2004).

177. *Id.* at 313–14.

178. *Id.* at 300.

179. *Compare id.* at 303–04 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (citing Ring v. Arizona, 536 U.S. 584, 602 (2002))), *with Apprendi*, 530 U.S. at 482–83 ("The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."). *See also* Harris v. United States, 536 U.S. 545, 563 (2002) ("Any 'fact that . . . exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone' . . . would have been, under the prevailing historical practice, an element of an aggravated offense." (citing *Apprendi*, 530 U.S. at 483)).

trial.[180] The Supreme Court did not address the Guidelines in these cases and did not mention the mandatory nature of the sentencing scheme in effect at the time. In *Apprendi* and *Blakely*, the Supreme Court considered state sentences imposed by state judges based upon specific state statutes.[181] In *Jones*, the Court analyzed aggravating factors in a federal statute, and the Guidelines again were not at issue.[182] More at issue in *Jones*, *Apprendi*, and *Blakely* were concerns for unfair surprise by the government and lack of notice to the defendant.[183] Again, the constitutional challenge to sentencing enhancements and sliding maximum punishments in these cases did not implicate the Guidelines or otherwise relate to section 3553(b), which made the Guidelines mandatory in federal court.[184]

Although the Court reserved opinion on the Guidelines, *Blakely* impacted federal practice immediately.[185] Following *Blakely*, district and circuit courts voiced varying opinions on the implication of the decision for federal sentencing.[186] Federal criminal practice after *Blakely* varied widely, and some courts, eager

180. *Blakely*, 542 U.S. at 296; *Apprendi*, 530 U.S. at 466; Jones v. United States, 526 U.S. 227, 227 (1999).

181. *See* Kathleen H. Morkes, *Where Are We Going, Where Did We Come From: Why the Federal Sentencing Guidelines Were Invalidated and the Consequences for State Sentencing Schemes*, 4 AVE MARIA L. REV. 249, 275–279 (2006) (describing how states had to reform their state sentencing regimes to conform with *Blakely*).

182. *Jones*, 526 U.S. at 227.

183. *See Blakely*, 542 U.S. at 296; *Apprendi*, 530 U.S. at 466; *Jones*, 526 U.S. at 227. *See generally* Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249 (1998) (discussing the constitutional due process issues presented by sentencing enhancements).

184. *See Blakely*, 542 U.S. at 296; *Apprendi*, 530 U.S. at 466; *Jones*, 526 U.S. at 227.

185. *See* United States v. Grier, 449 F.3d 558, 566 (3d Cir. 2006); United States v. Bradley, 400 F.3d 459, 462 (6th Cir. 2005); United States v. Guevara, 408 F.3d 252, 262 (5th Cir. 2005); United States v. Thompson, 421 F.3d 278, 281 (4th Cir. 2005); United States v. Cordoza-Estrada, 385 F.3d 56, 59–60 (1st Cir. 2004); United States v. Lopez-Zamora, 392 F.3d 1087, 1097–98 (9th Cir. 2004), *withdrawn*, 418 F.3d 1004 (9th Cir. 2005); United States v. Mendoza-Mesa, 384 F.3d 951, 953 n.2 (8th Cir. 2004), *vacated*, 543 U.S. 1181 (2005); United States v. Monsalve, 388 F.3d 71, 72 (2d Cir. 2004); United States v. Smith, 393 F.3d 717, 718 (7th Cir. 2004).

186. *See generally* Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 219 (2004) ("*Blakely* has created a ghastly mess, bringing the federal criminal justice system to a virtual halt and putting a number of state systems in disarray." (citations omitted)); Stephanie Gosnell, *Hurricane* Blakely *and the Calm After the Storm Found in* Booker, 58 ARK. L. REV. 449, 464–69 (2005) (discussing the confusion among state courts after the decision in *Blakely*).

to be freed from the mandatory scheme's reign, began to disregard the Guidelines in federal sentencing proceedings.[187] Federal defendants contributed to the discord by pleading guilty to crimes, yet refusing to admit to applicable enhancements. The confusion, disarray, and gamesmanship led to the Court taking up review of the Guidelines only six months later in *Booker*, as well as another case presenting similar issues, *United States v. Fanfan*.[188]

On January 12, 2005, a split majority of the Supreme Court decided *Booker* and applied *Blakely* to the mandatory sentencing scheme under the Guidelines.[189] In *Booker*, a narcotics prosecution, the Court reviewed the government's appeal after the Seventh Circuit, relying on *Blakely,* reversed a sentencing enhancement under the Guidelines that the judge applied at sentencing.[190] The enhancement increased Booker's sentence because of an additional amount of drugs that, while not in the indictment nor presented at trial, was attributable to him as "relevant conduct" under the Guidelines.[191] The district court sentenced Booker to thirty years, below the maximum punishment in his case from its inception, life imprisonment.[192]

The first majority opinion in *Booker*, although addressing the Sixth Amendment violation and extending the *Almendarez-Torres* rule to Guideline enhancements, foreshadowed the ultimate remedy adopted by the Court.[193] "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."[194] In *Booker*, the Supreme Court struggled for a remedy to the Sixth Amendment violation that "maintain[s] a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."[195] The Court linked the sentencing

187. *See, e.g.*, United States v. Booker, 543 U.S. 220, 228–29 (2005) (describing the lower court's decision to ignore the federal Guidelines).
188. *Id.* at 229 (consolidating *Fanfan* and *Booker* on appeal).
189. *Id.* at 226.
190. *Id.* at 227.
191. *Id.*
192. *Id.*
193. *Id.* at 244.
194. *Id.* at 233.
195. *Id.* at 246.

goal of uniformity with the necessary remedy to the Sixth Amendment violation related to district court judges finding guideline enhancements.[196]

Unlike in *Blakely*, under the mandatory Guidelines, Booker long knew about his offense's maximum punishment of life, the additional drugs forming the basis of his enhancement at sentencing, and his applicable sentencing range of thirty years to life.[197] The lack of unfair surprise and the notice to the defendant distinguishes *Booker* from its progeny. Instead, after *Blakely*, some Justices on the Court had the mandatory Guidelines in their sight.[198]

B. Incongruent Remedy in Booker

When the Court confronted the question of a remedy, a different majority weighed two options. The first "would engraft onto the existing system today's Sixth Amendment 'jury trial' requirement."[199] The second, as previewed by the first majority in discussing the constitutional violation, would maintain the mandatory Guidelines and its judicial findings, yet, as a final matter, reduce the resulting range to a mere advisory factor that the court may consider.[200] The second majority observed that it was not possible to "maintain the judicial factfinding that Congress thought would underpin the mandatory Guidelines system" after

196. *Id.* at 263.

197. *Id.* at 334 (Breyer, J., dissenting) (stating that unlike the Washington state system at issue in *Blakely*, the federal system in *Booker* provides a defendant with no guarantee that the jury's finding of factual elements will result in a sentence lower than the statutory maximum. Rather, the statutes put a potential federal defendant on notice that a judge conceivably might sentence him anywhere within the range provided by statute—regardless of the applicable Guidelines range); *see also* Witte v. United States, 515 U.S. 389, 399 (1995) ("We thus made clear that use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause."); Comment, *Sixth Amendment—State Sentencing Guidelines*, 118 HARV. L. REV. 333, 339–40 (2004) (stating that departure provisions indicate that the cases in which courts should depart are narrow, but without limiting judicial interpretation, departure remains possible in every case, suggesting that an increased sentence is never above "the maximum [a judge] may impose without any additional findings." (citing *Blakely*, 524 U.S. 296, 302 (2004))).

198. *See* Douglas B. Bloom, United States v. Booker *and* United States v. Fanfan: *The Tireless March of* Apprendi *and the Intracourt Battle to Save Sentencing Reform*, 40 HARV. C.R.-C.L. L. REV. 539, 542 (2005).

199. *Booker*, 543 U.S. at 246.

200. *Id.* at 246–47.

the first majority found judicial findings of applicable enhancements.[201]

After the Court's decision six months earlier in *Blakely*, some district courts already required the government to present and juries to find applicable guideline enhancements using the beyond a reasonable doubt standard.[202] In other words, in some jurisdictions, the government was already doing what the Court considered "impossible" in *Booker*. In most instances, jury factfinding of sentencing enhancements in the Guidelines was *possible*.

Jury factfinding did not alter the government's proof significantly in most cases. In some other cases, if a defendant admitted to the elements of the crime, but not the enhancement, then the process was complicated and lengthened by requiring separate phases of a trial, including *on just the enhancement* as opposed to the elements of the crime.[203] Arguably, the most complicating feature of judicial factfinding of sentencing factors lies in the careful construction of a special verdict form and additional jury instructions, explaining elements, deciding guilt, and thereafter finding sentencing factors.[204]

Not discussed in *Booker* was another option: prosecutors could resolve some of the issues associated with jury factfinding within their discretion. For example, following a guilty plea to the elements alone, the prosecutor would in some cases decide not to pursue quantitatively minor enhancements. In other cases, the enhancement may be the important determining factor and worthy of a jury trial. Prosecutorial discretion could allow a jury factfinding system to work with a mandatory sentencing scheme. It is unknown, however, the effect of such discretion on the sentencing goals of uniformity and proportionality or the corollary notion of predictability for the defendant.

201. *Id.* at 246.

202. *See supra* note 222 (citing post-*Blakely* cases).

203. *See, e.g.*, Washington v. Recuenco, 548 U.S. 212, 215 (2006) (deciding a post-*Blakely*, pre-*Booker* trial where prosecutors submitted "special verdict forms" to the jury so that it may decide sentencing factors in the case beyond a reasonable doubt). Federal criminal practice has a similar process with asset forfeiture allegations and death penalty considerations.

204. *See* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 677–78 (2005) (discussing the constitutional holding and the Court's remedy).

Nevertheless, the second majority, without discussing the post-*Blakely* practice or the true viability of other remedies for the constitutional violation, concluded that the process of jury factfinding under the Guidelines was impracticable, unsustainable, and inefficient.[205] The second majority opted to sever and excise Section 3553(b), which required district courts to apply the Guidelines, and the related standard of review section, Section 3742(e), which applies only in a mandatory federal scheme.[206] The result was that the Guidelines, after almost twenty years of mandatory application at federal sentencing, were rendered "effectively advisory."[207]

*C. The Post-*Booker *Effect*

The sea change that resulted from the Supreme Court's decision in *United States v. Booker* seemingly improved federal sentencing for the judiciary, the prosecution, and the defense. Federal district court judges enjoy true discretion at sentencing once again.[208] After several years of "advisory Guidelines," courts have exercised that discretion decidedly in favor of the criminal defendant imposing lower sentences than were called for when the Guidelines were mandatory.[209] *Booker* even liberated some federal prosecutors from a rigid aspect of federal criminal justice.[210]

The *Booker* court further devoted its attention to the *process* of federal sentencing in the wake of its remedy.[211] The Court instructed that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."[212] This would mean that the district courts still set sentencing hearings with ample time for the

205. *Booker*, 543 U.S. at 243–44.
206. *Id.* at 245–46.
207. *Id.* at 246.
208. *Id.*
209. *Id.*
210. *Compare* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING vii (2006) (presenting the finding that "[t]he rate of government-sponsored, below-range sentences has increased slightly after *Booker*, . . . [including] substantial assistance[,] . . . . Early Disposition Program departures . . . and other government-sponsored downward departures"), *with supra* notes 88–92, 135–37 (discussing DOJ protocol and the PROTECT Act aimed at defending the Guidelines and reducing the incidence of below-Guidelines sentences).
211. *Booker*, 543 U.S. at 243–44.
212. *Id.* at 264.

preparation of a presentence report (PSR) and full Guidelines analysis and calculations. The district court would still decide guideline enhancements and reductions and arrive at the applicable guideline range, as it did when the Guidelines were mandatory. The trial court still decides motions for departure from the applicable guideline range, yet it is not required to value the departure if granted.

Only after the familiar calculations and judicial findings does the sentencing court now "tailor the sentence in light of other statutory concerns."[213] Congress previously set forth seven "factors to be considered" in § 3553(a) of Title 18, United States Code.[214] The factors are sufficiently broad to justify any reasonable variance, and almost any variance from the Guidelines range with or without a viable ground for departure. They include the "nature and circumstances of the offense and the history and characteristics of the defendant"; the "need for the sentence . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . afford adequate deterrence; . . . [and] protect the public."[215] The court must also consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[216] The sentencing court, after *Booker*, must consider the factors in § 3553(a), the applicable Guidelines calculations, and departure provisions and policy statements on the record as justification for the sentence to be imposed. However, after navigating the procedural hurdles and making a record of the panoply of "sentencing considerations," the district court judge is free in most cases to impose a sentence from probation to the statutory maximum.

213. *Id.* at 245.

214. 18 U.S.C. § 3553(a)(1–7) (2009). Section 3553(a) factors include the following: (1) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the Guidelines; (2) any pertinent policy statement issued by the Sentencing Commission; (3) the need to avoid unwarranted sentencing disparities; (4) the need to provide restitution to victims; and (5) the requirement to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. *Id.*

215. 18 U.S.C. § 3553(a)(6) (2009).

216. *Booker*, 543 U.S. at 259–60.

Upon exercising the de novo standard of review called for in the statute, the Supreme Court directed courts of appeal to "review sentencing decisions for unreasonableness."[217] The defendant may challenge and the appellate courts may review the imposed sentence under a "reasonableness" standard.[218] Reasonableness, the new standard of appellate review,[219] has taken some time to formulate.[220] First, the appellate court's reasonableness review will enjoy abuse of discretion-type deference, regardless of the imposed sentences' relation to a Guideline sentence.[221] Second, and most important to the proposals outlined in this article, reasonableness review on appeal incorporates procedural and substantive components.[222]

217. *Booker*, 543 U.S. at 264 ("We infer appropriate review standards from related statutory language, the structure of the statute, and the 'sound administration of justice' . . . [a]nd in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].'"). *See* 18 U.S.C. § 3742(e)(3) (2009); *see also* Rita v. United States, 551 U.S. 338, 341 (2007) ("The federal courts of appeals review federal sentences and set aside those they find 'unreasonable.'" (citing *Booker*, 543 U.S. at 261–63)); United States v. Gall, 552 U.S. 38, 49–50 (2007); Kimbrough v. United States, 552 U.S. 85, 91 (2007); Berman, *supra* note 23, at 143; Jefferson Exum, *supra* note 23, at 118.

218. *Booker*, 543 U.S. at 260–61.

219. In *Booker*, the Court also struck down § 3742(e) because it cross-referenced § 3553(b). Section 3742(e) set forth the standard of review before "reasonableness." Section 3742(e) stated that appellate courts were to review sentences to determine whether they were (1) in violation of law; (2) resulting from an incorrect application of the Guidelines; (3) outside of the applicable Guidelines range; and (4) whether the district court failed to provide a written statement of reasons, or the sentence departed from the Guidelines range based on an improper factor or in contradiction to the facts. 18 U.S.C. § 3742(e) (Supp. 2005).

220. *See Rita,* 551 U.S. at 347–49; *Gall*, 552 U.S. at 49–50; *Kimbrough*, 552 U.S. at 91.

221. *See Gall*, 522 U.S. at 51.

222. *See id.*; United States v. Irizarry, 553 U.S. 708 (2008) (refusing to require the district court to provide notice to the parties that it intends to vary its imposed sentence from the Guidelines). For the procedural component, the appellate court must first ensure that the district court "committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors . . . or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *Gall*, 552 U.S. at 51. For the substantive component, the reasonableness review is an abuse of discretion type standard, where the appellate court should afford "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify [the sentence]." *Id.*

Because of the constitutional holding and the procedural guidance in *Booker*, the confusion about proving sentencing enhancements and imposing a sentence came to rest. By rendering the Guidelines advisory, the litigation process returned to the prosecution proving elements beyond a reasonable doubt and district court judges' findings of sentencing factors by a preponderance of the evidence. More important than procedural changes after *Booker* is the shift toward judicial discretion, lower sentences for defendants, and liberated prosecutors at federal sentencing.

1. The Return of Judicial Discretion at Sentencing

Following *Booker*, district courts again enjoy discretion at sentencing.[223] Restoring discretion to district judges may be the best explanation of how the constitutional challenge to judicial fact finding resulted in the Court's remedy in *Booker* and the "advisory" Guidelines.[224] The district court, after navigating the procedural steps,[225] now enjoys the freedom to impose a sentence between the statutory minimum (often no jail time) and the statutory maximum.

223. *See, e.g.*, United States v. Parris, 573 F. Supp. 2d 744, 750–52 (E.D.N.Y. 2008). The district court reasoned, "[I]f not for the wisdom of the Supreme Court in recognizing the need to free district courts from the shackles of the mandatory guidelines regime, I would have been confronted with the prospect of having to impose what I believe any rational jurist would consider to be a draconian sentence." *Id.* With an advisory guidelines range of 360 months to life, the *Parris* court imposed 60 months imprisonment for a fraud resulting in more than $2.5 million in loss and involving 500 victims. *Id.*

224. *See* United State v. Booker, 543 U.S. 220, 246 (2005); see also Fisher, *supra* note 6, at 74–77 (2007), which discusses that, as written, the Guidelines violated the Sixth Amendment. Fact findings increase the term to which a defendant may be sentenced. This operation of the Guidelines violated *Apprendi*. However, in the remedial part of the opinion, the *Booker* court rendered the Guidelines effectively advisory, thereby taking them outside of the scope of *Apprendi*. *Id.*

225. *Compare Gall*, 522 U.S. at 51 (discussing the possible procedural error the district court must now navigate at sentencing post-*Booker*, such as "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors . . . , or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range"), *with infra* Part VI (proposing amendments to Rule 11 and the Guidelines that require the district court to conduct the same procedural reasonableness review of a binding plea agreement and "specific sentence" therein).

Increasingly since *Booker*, courts' sentences fall below the applicable range of imprisonment[226] called for when the Guidelines were mandatory. The sentencing court can support almost any sentence post-*Booker* with the broad policy statements and statutory factors that judges must now consider. District court judges very seldom have exercised their discretion to hand down harsher sentences post-*Booker*.[227]

The judicial discretion of today promises not to present the same problems of pre-Guidelines discretion. Almost twenty years with the Guidelines and the post-*Booker* process ensures that district courts will exercise their discretion more appropriately and consistently with the goals of uniformity and proportionality.[228] This article's criticism of restored judicial discretion relates to its incompatibility with binding plea agreements and the counterbalance of the defendant's interest in predictability.

226. In federal criminal law, organizations gather and practitioners discuss sentencing data in terms of months of imprisonment. *See* U.S. SENTENCING COMM'N, *supra* note 1, § 5A. Other sentencing options and punishments are available by statute and under the Guidelines, including probation, community confinement, home confinement, supervised release, fines, restitution, and forfeiture, as well as certain collateral consequences of a federal conviction. For purposes of this article, the net benefit to the criminal defendant since *Booker* is more easily presented in terms of lower terms of imprisonment.

227. *See* U.S. SENTENCING COMM'N PRELIMINARY QUARTERLY DATA REPORT: 2ND QUARTER RELEASE, U.S. SENTENCING COMM'N tbl.1 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2010_Quarter_Report_2nd.pdf [hereinafter Q2 2010 DATA] (finding that a little over 500 of the nearly 40,000 sentences, about one percent, were above-Guidelines sentences relying on *Booker* or § 3553(a), as opposed to the court's grant of a government upward departure under the Guidelines); *see also* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING vii (2006), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf [hereinafter *BOOKER* REPORT] ("The rate of imposition of above-range sentences [was] . . . 1.6 percent after *Booker*.").

228. *Booker*, 523 U.S. at 243–44 (setting out the procedural requirements for post-*Booker* and the "reasonableness" framework of appellate review). The procedural requirement of the Guidelines, particularly after almost twenty years of mandatory application, promises to yield more uniform and reasoned sentences than from the judicial discretion before the mandatory Guidelines. *Id.*

2. The Statistical Benefit to Defendants

The statistics in the four years following *Booker* speak well for the individual defendant.[229] While the Commission wishes to interpret the data as status quo,[230] the sentences imposed since *Booker* reflect that judicial discretion and prosecutorial flexibility favor the defendant and should continue to do so.[231] The judiciary has spoken more clearly about certain types of prosecutions and defendants.[232] For example, district court judges, by their sentences, have commented on the federal system's treatment of first-time offenders, as well as so-called "career offenders."[233]

The Commission, in its *Booker* Report released in 2006, stated that "[a] lack of uniformity that existed pre-*Booker* in the reporting of sentencing information to the Commission, especially the

229. *BOOKER* REPORT, *supra* note 227, preamble at vii ("The rate of government-sponsored, below-range sentences has increased . . . after *Booker* to a rate of 23.7 percent [in 2006.] . . . The rate of imposition of [other] below-range sentences has increased after *Booker* to a rate of 12.5 percent[,] . . . [and i]n approximately two-thirds of cases involving [other] below-range sentences, the extent of the reductions granted are less than 40 percent below the minimum of the range."); Q2 2010 DATA, *supra* note 227, at tbls.1 & 2 (demonstrating that, between October 2009 and March 2010, less than fifty-seven percent of sentences were within or above the Guidelines range and, in almost thirteen percent of cases, district courts impose a lower sentence, citing *Booker* or § 3553(a), as opposed to a recognized departure in the Guidelines).

230. *BOOKER* REPORT, *supra* note 227, at vi. The Commission attempts to classify its post-*Booker* statistics as highly consistent with the mandatory Guidelines statistics. For example: "National data show that when within-range sentences *and government-sponsored, below-range sentences* are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent. This conformance rate remained stable throughout the year that followed *Booker*." *Id.* (emphasis added). The statistic is misleading because it fails to account for the additional government-sponsored, below-Guidelines sentences and the significant variances awarded in the majority of below-Guidelines sentences imposed post-*Booker*.

231. *See supra* note 229.

232. *BOOKER* REPORT, *supra* note 227, at ix–xi.

233. *Id.* "The rate of imposition of below-range sentences for first offenders increased after *Booker*. . . . [and t]he rate of imposition of below-range sentences for career offenders increased after *Booker*." *Id.* at x; *see also* Q2 2010 DATA, *supra* note 227, at tbl.3 (aggregating sentencing data by offense conduct category, for example, courts recently imposed below-Guidelines sentences without grounds for Guidelines departures often in white collar, pornography, and drug trafficking offenses); *cf.* Marcia Coyle, *Justice Department Calls for Probe of Federal Sentencing Patterns,* NAT'L L.J., July 19, 2010, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463650912&slreturn=1&hbxlogin=1 ("Those widely disparate sentences don't make sense, ignore federal sentencing guidelines and are a sign of a potentially very big problem, according to the U.S. Department of Justice.").

reporting of reasons for the sentence imposed, was exacerbated post-*Booker*."[234] The Commission also reported that the results were too preliminary to understand the decision's effects. "The differences in practice and procedure that resulted from *Booker* are not entirely quantifiable, and this impacts the quality of the data collected."[235]

Statistics represent generalized trends. Yet, has the federal system revived the pre-Guidelines problem of a defendant's sentence depending more upon the judge imposing sentence than the process required at sentencing? The generation of judges that has presided on the federal bench only during the mandatory Guidelines era may cling to the structure of the Guidelines and reserve variances only for an occasional outlier case. Courts have identified a problem of "guidelineism," or "guidelinitis"—the inability of some federal courts to break their habit of mechanically relying on the Guidelines alone.[236] Most district judges since *Booker* may impose a lower sentence for a defendant in certain cases; the variable for some defendants is in appreciating where *their* case fits in.

3. Liberated Federal Prosecutors

The return of judicial discretion to the courts was not only significant for defendants, but also for the government.[237] Government attorneys, too, were liberated from the mandatory federal sentencing scheme post-*Booker*. After *Booker*, the judiciary has imposed sentences based more upon government-sponsored motions rather than those based upon substantial assistance.[238]

234. *BOOKER* REPORT, *supra* note 227, at v.

235. *Id.* at vi.

236. *See* United States v. Sedore, 512 F.3d 819, 828–29 (6th Cir. 2008) (Merritt, J., dissenting).

237. Q2 2010 DATA, *supra* note 227, at tbl.1; U.S. SENTENCING COMM'N PRELIMINARY QUARTERLY DATA REPORT: 3RD QUARTER RELEASE, U.S. SENTENCING COMM'N tbls.1 & 2 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2010_Quarter_Report_3rd.pdf [hereinafter Q3 2010 DATA] (demonstrating the increase in the categories of "government sponsored" motions and the increase in judicial variances that the government may not be opposing as vehemently post-*Booker*); *cf. supra* notes 88–92, 134–137 (discussing the DOJ protocol during the mandatory Guidelines to argue for Guidelines sentences and oppose all motions for downward departure or otherwise lower sentences).

238. *See BOOKER* REPORT, *supra* note 227, at vii; *see also* Q3 2010 DATA, *supra* note 237, at tbls.1 & 2 (providing statistics for sentences relative to the Guidelines range

Further, the government cannot reasonably, and does not after *Booker*, oppose all motions for a below-Guidelines sentence, argue for Guidelines sentences, or blindly defend the Guidelines range *in all cases*. Prosecutorial discretion has also returned to federal sentencing, and a renewed role for binding plea agreements is consistent with the trend.[239]

V. RENEWED ROLE FOR BINDING PLEA AGREEMENTS

A sentencing scheme, particularly one reliant on judicial discretion, must allow a defendant to pursue, negotiate, and contract for *what he believes is* a consistent and predictable sentence *in his or her case*.[240] This article argues that, in addition to restored judicial discretion and lower sentences, the pendulum *also* must swing toward predictability and informed decision making for defendants. Following *Booker*, the government and the defendant must be permitted to negotiate binding plea agreements in some circumstances.

District court judges should be more open to binding plea agreements. Although it is too early to tell, the opposite result is more likely. This generation of district court judges, after almost twenty years of the mandatory Guidelines, may disfavor anything that minimizes their role at sentencing.[241] Prosecutors, too, will

by circuit and district and by each primary offense). These reports indicate a trend toward more government-sponsored motions for lower sentences other than its predominant substantial assistance motion.

239. *See BOOKER* REPORT, *supra* note 227; *see also* Q3 2010 DATA, *supra* note 237, at tbls.1 & 2 (providing statistics for sentences relative to the Guidelines range by circuit and district, and by each primary offense). Defense attorneys and district courts today argue both for traditional grounds of departure under the Guidelines and for lower sentences based upon downward variances from the Guidelines range. Although difficult to glean from Commission reports, the government does not, and cannot, oppose all motions, arguments, and judicial findings for below-Guidelines sentences.

240. *See* FED. R. CRIM. P. 11(c)(1)(C); *see also supra* Part V (discussing a renewed role for binding plea agreements post-*Booker*).

241. *See supra* note 143 (discussing how district court judges may continue to disfavor binding plea agreements after the Supreme Court restored their discretion in *Booker*); *supra* Part IV.C (discussing the limited judicial role in a "plea and sentence" federal system). After almost twenty years of having the Commission severely limit its discretion at sentencing, district courts will likely not embrace a mechanism that similarly impacts the court's discretion to impose its sentence. Other courts did not favor binding plea agreements during the mandatory Guidelines, and will be less inclined to accept a "specific sentence" today. *See, e.g.*, United States v Seidman, 483 F. Supp. 156, 158 (D. Wis. 1980) ("At the outset, the Court would note that it never will accept a . . . [binding] plea

likely not embrace binding plea agreements without significant changes to the rules, perceptions, and stigma today associated with them. Even if inclined, the Commission has not amended the Guidelines' treatment of binding plea agreements following *Booker*.

*A. The Guise of Continued Uniformity Post-*Booker

The Commission's post-*Booker* data collection analysis purports that its two central policy considerations of uniformity and proportionality continue to be served.[242] There are several reasons that uniformity and proportionality will not endure.[243]

First, the judges imposing sentences in the four years following *Booker* were primarily the same judges appointed and presiding during the mandatory Guidelines era. Whether mandatory or advisory, some of these judges will default to what they know best: exercising their discretion within a relatively narrow window. Second, some judges earnestly continue to sentence according to the Guidelines to *promote* uniformity between similarly situated defendants sentenced today and before 2005. As new judges are appointed and memories of mandatory Guidelines fade, there is likely to be less uniformity and proportionality.

Restoring the trial courts' discretion to determine appropriate sentences based upon *individuals*, as opposed to calculations, and to lower sentences were progressive developments.[244] The individual defendant's perception of sentencing, however, has not

agreement. It is this Court's prerogative to determine the type of sentence that should be imposed upon a defendant for the offense of which he or she has been adjudged guilty.").

242. *See supra* note 230 (discussing the Commission's attempt to convey consistent post-*Booker* results); *see also* Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 249–50 (2005).

243. *See supra* note 229 (demonstrating that the statistics show courts have strayed further away from the Guidelines in the five years following *Booker*); *see also* Jefferson Exum, *supra* note 23, at 117 ("[T]he tension between procedural reasonableness based on consideration of the Sentencing Guidelines and substantive reasonableness that allows district judges to disregard the Guidelines for policy errors suggests that the best path toward achieving the balance between sentencing uniformity and sentencing discretion endorsed in *Booker* is to rethink the role of the Sentencing Guidelines.").

244. *See supra* Part IV.C (discussing the "post-*Booker* effect" in terms of returned judicial discretion, lower and more individualized sentences for defendants, and liberated prosecutors). The court's restored discretion, relative to pre-Guidelines judicial discretion, is more uniform, proportional, and reasoned due to the procedural and substantive requirements imposed by the Court in *Booker*. *See* United States v. Booker, 543 U.S. 220, 223 (2005).

gone unaffected. When the mandatory Guidelines were applied, the defendant and his counsel could reasonably predict the post-plea outcome and make informed decisions.[245] Post-*Booker*, the structured process again depends as much upon the judge as it does upon sentencing considerations.[246]

*B. The Potential Impact of Binding Plea Agreements Post-*Booker

Now that the Guidelines are rendered "advisory," the parties must be encouraged and empowered to negotiate and contract for a "specific sentence or sentencing ranges" in appropriate cases.[247] There are reasons that a prosecutor may want to enter into a binding plea agreement in some cases. This article focuses on the defendant's motivation post-*Booker*. With a less predictable result, some defendants under the advisory Guidelines may be motivated by a negotiated result that they were involved in reaching.[248]

Putting motivation aside, the government and the defendant must be permitted to negotiate the plea agreement's most important term *without significant limitation*.[249] The government and the defendant, like a sentencing court, can consider federal sentencing policy, the Guidelines, and other factors. As proposed in Part VI, Federal Rule of Criminal Procedure 11 and the Guidelines should permit (and encourage) the parties to undergo the same process in reaching an agreed-upon sentence in a binding plea agreement, as the court does in imposing a sentence. The parties' consideration of the same factors may yield more consistent, predictable, and personally *satisfying* results.

245. *See generally* U.S. SENTENCING COMM'N, *supra* note 1, § 2 (outlining Guidelines provisions relative to hundreds of different offenses and offense conduct characteristics).

246. *See supra* Part I (comparing the predictability and information available in a Guidelines conversation and post-*Booker* conversation).

247. FED. R. CRIM. P. 11(c)(1)(C).

248. The defendant's motivation during the mandatory Guidelines would have been exclusively to negotiate a lower sentence than called for under the mandatory Guidelines. Post-*Booker*, the defendant's motivations have become more complex. For example, in modern federal sentencing, the defendant's desire to negotiate for a "specific sentence" in a binding plea agreement may be hedging against an unpredictable judge or a desire for an early resolution of the sentence, as well as the guilt phase.

249. *Compare supra* Part V (discussing a renewed role for binding plea agreements), *with supra* Part III.B (discussing how the Guidelines, Section 6B1.2, and its commentary, rendered binding plea agreements meaningless, and marginalized their use for more than twenty years).

The court's standard for acceptance of the binding plea agreement could reflect the appellate court's review of judicially imposed sentences.[250] The district court's acceptance of a binding plea agreement could have both the procedural and substantive component of the review.[251] First, the district court could review whether the parties in the plea agreement navigated through the same procedural hoops required of it.[252] Second, the district court could evaluate the "specific sentence or sentencing range" in the plea agreement for "reasonableness."[253] Because a binding plea agreement accepted by the court typically involves no appeal, this new standard for acceptance would reinforce sentencing uniformity and sentences reviewed for reasonableness.

C. Binding Plea Agreements in Enron Prosecution of the NatWest 3

In 2006, one of the first-filed Enron cases, involving three British bankers who worked for NatWest and were accused of fraud, was approaching its trial date.[254] The "NatWest 3," as the media dubbed them, proceeded to trial late due to a hotly contested and high-level extradition battle to bring the bankers to the United States to face the charges related to their dealings with Enron executives.[255] In England, the media and other outlets vilified the United States for its pursuit of the NatWest 3, who maintained both their innocence and their belief that the crimes alleged were not indictable offenses in their home country.[256] For these reasons, and due to the growing attention to Enron in general, the prosecution and a successful result were of great importance to the DOJ.

250. *See supra* note 222 (discussing the Supreme Court's formulation of "reasonableness" review and its procedural and substantive components established in *Gall*, *Rita*, and *Kimbrough*).

251. *See id.*

252. United States v. Booker, 543 U.S. 220, 245–46 (2005) (establishing the procedural framework of consideration framing the trial court's post-*Booker* discretion).

253. *Id.* at 262–68 (implementing "reasonableness" as the appellate standard of review).

254. Simon Freeman, *Enron Three Lose Test Case Against Extradition to U.S.*, TIMES (London), Feb. 21, 2006, http://www.timesonline.co.uk/tol/news/uk/article733156.ece (last visited Feb. 18, 2011); *NatWest Three: The U.S. Indictment*, BBC NEWS, July 12, 2006, http://news.bbc.co.uk/2/hi/business/5174358.stm (last visited Feb. 18, 2011).

255. *See* Freeman, *supra* note 254.

256. Steve Boggan, *We Want British Justice, Not a US Witchhunt*, TIMES (London), Feb. 3, 2005, http://www.timesonline.co.uk/tol/life_and_style/article509608.ece?token=null&offset=0&page=1.

As to the three defendants, the matter was resolved by binding plea agreements.[257] From the defendants' perspective, they ran a litigation risk of conviction at trial and the prospect of a higher sentence. They also negotiated a specific sentence when the judge's sentence following guilty pleas was more unpredictable. Of Judge Gleeson's prosecutorial motivations for entering into a binding plea agreement, many were present in the NatWest 3 prosecution.[258] If the case had proceeded to trial and the defendants were convicted, many in Great Britain and in the international media would have considered the prosecution unfair, politically motivated, and potentially motivating for other countries to use as fodder for retribution in dealing with U.S. citizens accused of crimes abroad.

The admissions at their respective guilty pleas, taken as part of a binding plea agreement, quieted the impending storm. The term of imprisonment imposed may have represented "justifiable reasons" under the Guidelines Section 6B1.2, or an unjustified, discounted plea. In the end, the specific sentence proved far less important than reaching an agreement.[259] The case should exemplify the importance and potential impact of binding plea agreements post-*Booker*.

D. The Downside to Binding Plea Agreements

It is important to note that binding plea agreements are not appropriate in all, or even most, federal cases. While this article generally proposes an increased use of binding plea agreements, in the majority of federal criminal cases the government will not want to explore a negotiated sentence. In many serious federal cases,

257. *See* Plea Agreement, United States v. Bermingham, No. 02CR00597, 2007 WL 4983408 (S.D. Tex. Nov. 28, 2007); *cf.* Moohr, *supra* note 104, at 941–42 (praising the Guidelines' uniform and unbiased treatment of white collar crime cases).

258. Gleeson, *supra* note 22, at 640. Specifically, there were definite trial risks that the jury would not understand the evidence or the legal theory of the case and, more generally, of an acquittal. Also present were considerations that the result was "fair in the circumstances," which included a lengthy pretrial stay in the United States and a significant post-indictment delay due to the extradition issues. Maybe even, as Judge Gleeson describes, "the milk of human kindness" factored into the agreement. *Id.*

259. Pursuant to the plea agreements in *United States v. Bermingham*, each containing substantially the same terms, the defendant and the government agreed to a "specific sentence" of thirty-seven months imprisonment. Plea Agreement, *Bermingham,* 2007 WL 498430, at *38.

the government still will argue for a significant sentence to be imposed by the court. Negotiating an appropriate resolution has not been part of the federal prosecutor's duties in more than twenty years. Like the judiciary, adapting to a renewed role for binding plea agreements after the Guidelines' era will not come easily.

The binding plea agreement must be beneficial to the government, as well as the defendant. There are still some cases where a federal felony conviction and a sentence are more important than a sentence of a specific duration or a Guidelines sentence. So long as the defendant appreciates the potential risk in the post-*Booker* binding plea agreement, the tool could prove worthwhile in some cases.

The binding plea agreement, even in the appropriate case, has potential downsides for the defendant. First, binding plea agreements come with the inherent contractual risks of bargaining for a specific sentence.[260] The defendant may have sought a "specific sentence or sentencing range" in a binding plea agreement in an effort to avoid the sentence to be imposed by the court or for his own piece of mind in having negotiated a known result.[261] But the risk is the bargained-for result could be greater than the sentence that the court now would have imposed post-*Booker*.

Second, the binding agreement, once accepted by the court, is final and will not be subject to typical challenges on appeal.[262]

260. *See, e.g.*, United States v. Sanchez, 562 F.3d 275, 280 (3d Cir. 2009) (holding that the word "binding" in the plea agreement context keeps its ordinary meaning under contract principles); *see also* Cicchini, *supra* note 18, at 173. ("Every plea bargain contains one or more promises and contemplates exchange between the government and the defendant either immediately, in the future, or both.").

261. FED. R. CRIM. P. 11(c)(1)(C). A negotiated sentence under Rule 11(c)(1)(C) in the post-*Booker* era will likely call for a "specific sentence or sentencing range" below the Guidelines.

262. Since binding plea agreements were introduced into federal criminal practice in the 1970s, courts have held that a defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal. United States v. Green, 595 F.3d 432, 438 (2d Cir. 2010) (holding that the defendant was bound by his Rule 11(c)(1)(C) plea agreement, despite the subsequent change to the Guidelines related to crack cocaine and § 3782's function to lower sentences based upon subsequent changes to the Guidelines); *see* United States v. Pratt, 657 F.2d 218, 220 (8th Cir. 1981); *see also* FED. R. CRIM. P. 11(d)(2)(B), (e) (stating that a defendant must demonstrate a reason for requesting withdrawal of plea); United States v. Pagan-Ortega, 372 F.3d 22, 28 (1st Cir. 2004) (regret is not an acceptable grounds to withdraw a plea; defendant must prove an unfair and unjust result to withdraw binding

Thus, the positives of owning contractual responsibilities can also be the negatives.[263] Contract principles dictate that either party may rescind the plea agreement before the court's acceptance of the agreement,[264] yet, once accepted, the contact is formed and mutually enforceable.[265] Further, parties will likely memorialize agreed-upon sentences pursuant to Rule 11(c)(1)(C) in a plea agreement accompanied by an appellate waiver[266] or, at the very least, the determinative sentence will be presumptively reasonable.[267] In addition, the specific sentence in a binding plea agreement will not qualify for a sentence modification under § 3582(c), which allows for a sentence to be adjusted if the Sentencing Commission lowers relevant Guidelines.[268] Nor will it be adjusted for other post-sentencing "corrections" under Rule 35(b).[269] Once agreed to and accepted with the sentence imposed,

11(c)(1)(C) agreement). *See generally* MOORE ET AL., *supra* note 113, § 611.02 n.11.

263. *Sanchez*, 562 F.3d at 282 (holding that a binding plea agreement could not be undone by the discretionary possibility of a different sentence under the Guidelines).

264. The general rule, however, is subject to a detrimental reliance exception. Even if the agreement has not been finalized by the court, "[a] defendant's detrimental reliance on a prosecutorial promise in plea bargaining could make a plea agreement binding." McKenzie v. Risley, 801 F.2d 1519, 1527 (9th Cir. 1986), *vacated in part on other grounds*, 842 F.2d 1525 (9th Cir. 1988).

265. *See, e.g.*, United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (finding that when determining whether disputed plea agreements have been formed or conditions performed, courts have drawn the formation and interpretation of commercial contracts); *see generally* Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978) (analyzing criminal plea agreements in terms of contractual scenarios).

266. Every circuit has held that some forms of appeal waivers are permissible in a plea agreement. *See* United States v. Andis, 333 F.3d 886, 889–92 (8th Cir. 2003); United States v. Fleming, 239 F.3d 761, 764 (6th Cir. 2001); United States v. Hernandez, 242 F.3d 110, 113–14 (2d Cir. 2001); United States v. Jemison, 237 F.3d 911, 916–18 (7th Cir. 2001); United States v. Khattak, 273 F.3d 557, 559–63 (3d Cir. 2001); United States v. Teeter, 257 F.3d 14, 21–27 (1st Cir. 2001); United States v. Brown, 232 F.3d 399, 402–06 (4th Cir. 2000); United States v. Nguyen, 235 F.3d 1179, 1182–84 (9th Cir. 2000); United States v. Rubio, 231 F.3d 709, 711-13 (10th Cir. 2000); United States v. Howle, 166 F.3d 1166, 1168–69 (11th Cir. 1999); United States v. Melancon, 972 F.2d 566, 567 (5th Cir. 1992).

267. United States v. Welker, No. 09-3409, 2010 WL 2542966, at *1 (8th Cir. June 25, 2010) (opining that "Welker received the very sentence he agreed to in his plea agreement").

268. *See Sanchez*, 562 F.3d at 280–81 (citing United States v. Cieslowski, 410 F.3d 353, 364 (7th Cir. 2005)).

269. United States v. Semler, 883 F.2d 832, 833–34 (9th Cir. 1989) (holding that Rule 11(e)(3) forbids a lenient departure, even based on Rule 35(b), which permits courts to correct illegal sentences, when the sentence was agreed to under an 11(e)(1)(C) plea agreement).

the agreement will be enforced.[270]

Third, a binding plea agreement is subject to some of the same limitations as any other plea agreement in federal court. For instance, the agreement will not bind separate sovereigns, such as state prosecution offices, that may prosecute a defendant for the similar conduct.[271] Whether binding or not, a plea agreement is a contract between a defendant and *the specific* prosecutor's office signing the agreement, and the agreement must be supported in the facts.[272] Further, the court must determine that there is a factual basis for the plea, as there are no "legal fictions" in federal plea bargaining.[273]

270. *See* United States v. Bernard, 373 F.3d 339, 343 (3d Cir. 2004); *see also* United States v. Fritsch, 891 F.2d 667, 668 (8th Cir. 1989) ("This court has held that a defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal." (citing United States v. Pratt, 657 F.2d 218, 220 (8th Cir. 1981))).

271. *See* United States v. Gebbie, 294 F.3d 540, 550 (3d Cir. 2002) ("[W]hen a United States Attorney negotiates and contracts on behalf of 'the United States' or 'the Government' in a plea agreement for specific crimes, that attorney speaks for and binds all of his or her fellow United States Attorneys with respect to those same crimes and those same defendants."); United States v. Johnston, 199 F.3d 1015, 1021 (9th Cir. 1999) (holding that while ambiguities in plea agreement must be construed against the government, where language is clear in binding only a particular district, another district is not bound by the agreement); United States v. Annabi, 771 F.2d 670, 672 (2d Cir. 1985) (holding that "[a] plea agreement binds only the office of the United States Attorney for the district in which the plea is entered unless it affirmatively appears that the agreement contemplates a broader restriction"). *But see* United States v. Harvey, 791 F.2d 294, 303 (4th Cir. 1986) (construing ambiguity in plea agreement against the Government and thus holding the agreement was binding on another federal district); Elaine K. Zipp, Annotation, *When is Federal Prosecutor Bound by Promises of Immunity or Plea Bargains Made by Another Federal Agent*, 55 A.L.R. FED. 402 (1981).

272. *See* Ashcroft July 2003 Memo, *supra* note 86, at 2–3 (admonishing federal prosecutors from "fact bargaining" or otherwise keeping information from probation and the court); *see also* Santobello v. New York, 404 U.S. 257, 262 (1971) (a plea agreement negotiated by one prosecutor is binding upon all other prosecutors on the same staff); *see also* DAVID S. RUDSTEIN, C. PETER ERLINDER & DAVID C. THOMAS, *Pleas and Plea Bargaining*, *in* CRIMINAL CONSTITUTIONAL LAW § 12.06(11)(e) (2009) (explaining the court's reasoning and holding in *Santobello*).

273. *See* FED. R. CRIM. P. 11(b)(3); *see also* FED. R. CRIM. P. 11 (1966 amendments) ("The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty."). Some district courts read the judicial duty—to ensure there is a "factual basis for the plea"—to mean factual support for a term of the plea agreement, such as the "specific sentence" in a binding plea agreement. FED. R. CRIM. P. 11(c)(1)(C).

These risks and requirements of binding plea agreements must be considered. And a binding plea agreement will not be appropriate in most federal prosecutions. This article's proposed renewed role for binding plea agreements, and the substantive proposals that follow, advocate for the *opportunity* for the government and the individual defendant to negotiate and contract for appropriate sentences in some cases.

VI. PROPOSED CHANGES TO EMBRACE BINDING PLEA AGREEMENTS

This article proposes that Congress should enact a new standard for judicial acceptance of binding plea agreements post-*Booker*. Congress should empower criminal defendants and federal prosecutors *in some cases* to negotiate and contract for a sentence *they* perceive is uniform, proportional, and just. Binding plea agreements are not appropriate in most cases, yet the parties must be permitted to enter into agreements for a specific sentence that is "reasonable" and consistent with Congress's original intent underlying Rule 11(c)(1)(C).[274] Instead, the Guidelines' outdated standard continues to marginalize this potentially valuable tool.

The Guidelines' policy statement and commentary related to accepting binding plea agreements is inapplicable after *Booker*.[275] Trial courts are imposing below-Guideline sentences in more than forty percent of cases.[276] No criminal defendant today would negotiate for a Guidelines sentence when statistics show it to be the worst-case scenario.[277] The current standard demands that the court reject a binding plea agreement in some circumstances when the court would have imposed a similar sentence without the binding agreement. This must change.

274. United States v. Burruezo, 704 F.2d 33, 36 (2d Cir. 1983) (stating that Rule 11 "specifically provide[d] for possible *concessions* that the government may make in a plea agreement . . .") (emphasis added).

275. *See* Q2 2010 DATA, *supra* note 227 (discussing that district courts increasingly are imposing sentences below the Guidelines, almost forty percent, according to the Commission's last quarterly report, and the amount of the variance from the Guidelines is similarly increasing).

276. Q3 2010 DATA, *supra* note 237, at tbls.1 & 2 (showing that between October 1, 2009, and June 30, 2010, 43.4% of sentences were below the Guidelines range).

277. *See supra* Part IV.C.2 (discussing the statistical benefit to the defendant post-*Booker*).

Further, it has been almost twenty years since binding plea agreements served an important role in federal criminal practice. As a result, most district judges and prosecutors are likely not familiar with binding plea agreements.[278] District courts still evaluate the merits of the specific sentence called for in a binding plea agreement.[279] The standard must shift from a less qualitative evaluation of the sentence to a standard similar to the appellate review of imposed sentences, the deferential standard of reasonableness.

Lastly, the prosecutorial stigma and mystery of binding plea agreements also lessen the likelihood of its renewed role. The stigma associated with binding plea agreements derives from the *sub rosa* and underground deals struck during the mandatory Guidelines era. The mystery involves seeking judicial acceptance of a deal with a judge who is prohibited by statute from having a role in plea negotiations. This article proposes changes to Rule 11, the Guidelines' policy statements, new DOJ protocol, a proposed local rule, and more palpable plea agreement language.

A. Proposed Revisions to Rule 11

The standard for judicial acceptance of a binding plea agreement must change. Congress should enact an amendment to Rule 11 that introduces a new standard. The new standard, like the appellate court's reasonableness review of judicially imposed sentences, should have a procedural and substantive component.[280]

278. The Guidelines were implemented in 1987 and marginalized the role of binding plea agreements through a policy statement and commentary. U.S. SENTENCING COMM'N, *supra* note 3, §§ 6B1.2(c), 6B1.2 cmt. (defining the standard for judicial acceptance of a binding plea agreement).

279. *See* FED. R. CRIM. P. 11(c)(3)(A) (describing the court's discretion to accept or reject a binding plea agreement).

280. *See supra* note 222 (discussing the Supreme Court's test of "reasonableness" as having a procedural and substantive component); Gall v. United States, 552 U.S. 38, 51 (2007) (explaining court's review of judicially imposed sentences must include procedural and substantive considerations); *see also* United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006) ("Reasonableness review involves both procedural and substantive components."); United States v. Paladino, 401 F.3d 471, 488 (7th Cir. 2005) ("[R]easonableness depends not only on the length of the sentence but on the process by which it is imposed.").

It is important to note that a district court's imposed sentence may be challenged as unreasonable by the defendant for being too high or by the government for being too low. *See* United States v. Bishop, 469 F.3d 896, 906–07 (10th Cir. 2006) (in which the defendant challenged his sentence as unreasonable because it was higher than the recommended sentencing range). In this article's

Procedurally, the district court should review the binding plea agreement to ensure that the parties engaged in the same process, ran the same calculations, and considered the same factors that the district court would consider at sentencing.[281] Substantively, the district court should review the specific sentence or sentencing range in the agreement with an abuse of discretion type of standard.[282]

The Court has noted in cases since *Booker* that the reviewing court should defer to the district court as the entity with the greatest familiarity with the case; applying that same analysis, the parties to a binding plea agreement have an even greater familiarity with the facts than the district court.[283] If the government and the defendant navigate the same process and agree upon a reasonable sentence, then the new standard should require the court to accept the agreement. The district judge that disagrees with, values differently, or otherwise dislikes the sentence imposed must defer to the contracting parties. The amendment to Rule 11 could read

proposal to have district court judges review the sentence in a binding plea agreement for reasonableness, the court need only access the inevitable downward variance of a binding plea agreement. *See id.* at 907 ("[T]he extremity of the variance between the actual sentence imposed and the applicable Guidelines range should determine the amount of scrutiny we give to the district court's substantive sentence.").

281. For example, under the New Jersey state sentencing scheme, a state judge must accept a plea agreement *unless* the specific sentence in the agreement "contravenes the sentencing criteria of the code" or the record demonstrates prosecutorial abuse of discretion. *See* State v. Bilse, 581 A.2d 518, 523 (N.J. 1990).

282. Parties should reflect their considerations of the proper sentencing factors in the plea agreement, whereas the court must place the same considerations on the record. *See* United States v. Coronado, 554 F.2d 166, 170 n.5 (5th Cir. 1977) ("[C]laims of noncompliance with rule 11 must be resolved solely on the basis of the rule 11 transcript. That transcript provides all that is needed and all that is allowed for the resolution of such claims.").

A counterargument against allowing the government and a defendant to contract for a specific sentence so long as they consider the same factors is abuse and disparate treatment. The enhanced prosecutorial discretion, the discretion to grant binding agreements, and the extent of the benefit, may be ripe for abuse and unbalanced application. Yet, many federal prosecution offices have an approved hierarchy and internal policies reflecting their declination/prosecution standards. Similarly, these prosecution shops have committees and standards for granting downward departures and approving the amount of the departure recommended to the court. Binding plea agreements could be handled in the same way. Prosecution offices could establish internal standards, committees, and hierarchical approval for granting and valuing binding plea agreements.

283. Kimbrough v. United States, 552 U.S. 85, 109 (holding that the trial judge has "greater familiarity with . . . the individual case and the individual defendant before him . . ." (citing Rita v. United States, 551 U.S. 338, 357 (2007))).

as follows (new language in **bold**):

> Federal Rules of Criminal Procedure, IV. ARRAIGNMENT AND PREPARATION FOR TRIAL , Rule 11. Pleas * * * (c) Plea Agreement Procedure. * * * (3) Judicial Consideration of a Plea Agreement.
>
> (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.
>
> * * *
>
> **(C) The court shall review any written plea agreement entered into pursuant to subsection Rule 11(c)(1)(C). The agreement must demonstrate that the parties in reaching the specific sentence or sentencing range in the agreement considered the same factors and policy statements that the court would consider at sentencing.**[284] **If the parties did so and the specific sentence or sentencing range is reasonable, then the court shall accept the agreement under Rule 11(c)(1)(C) and impose sentence accordingly.**

Such a standard encourages the parties to negotiate binding plea agreements in some cases and removes the stigma associated with binding plea agreements. Finally, this new standard takes the mystery out of bringing a binding plea agreement before a judge who may reject the agreement based upon reasons not known to the parties. An act of Congress in amending Rule 11 is not the only way to enact a new standard for judicial acceptance of plea agreements; the Commission could also change the Guideline policy statements after *Booker*.

284. Today, the agreement must reflect that the parties (i) calculated the applicable sentencing range under the applicable edition of the United States Sentencing Guidelines; (ii) considered the applicable range; and (iii) considered the factors set forth in § 3553(a). FED. R. CRIM. P. 11(b)(1)(M) (The defendant must understand the process "in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a) . . . .").

B. Proposed Amendment to the Applicable Guidelines' Policy Statements

Alternatively, but less likely, the Commission could introduce the new standard for judicial acceptance of binding plea agreements. It was, after all, the Guidelines that ushered binding plea agreements out of federal criminal practice more than twenty years ago.[285] The policy statement, however, could be redrafted to reflect the district court's procedural and substantive review of a binding plea agreement as set out above.[286] The inapplicable standard reflected in Guidelines policy carries no practical effect following *Booker*.[287] The Guidelines should restore the parties' "power to enter into sentence bargains pursuant to Rule 11(c)(1)(C)" as Congress intended.[288]

C. DOJ Protocol and Attorney General Memoranda

Changing Rule 11 and the Guidelines would provide the government and defendant with the opportunity to enter into the type of binding plea agreements that Congress intended when it authorized their use under Rule 11.[289] There must also be a perception change related to binding plea agreements post-*Booker*.

285. *See supra* Parts III.A and B (arguing that the mandatory Guidelines effectively replaced binding agreements and, through Guidelines' policy statements, rendered these agreements meaningless for more than twenty years).

286. *See* Gall v. United States, 552 U.S. 38, 51 (2007) (explaining that the court's review of judicially imposed sentences must include procedural and substantive considerations); *see also* United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006) ("Reasonableness review involves both procedural and substantive components."); United States v. Paladino, 401 F.3d 471, 488 (7th Cir. 2005) ("[R]easonableness depends not only on the length of the sentence but on the process by which it is imposed."); *supra* note 222 (discussing the Supreme Court's test of "reasonableness" as having a procedural and substantive component).

Practically, the district court has the benefit of a U.S. Probation's pre-sentence report (PSR), which includes the Guidelines calculation and the post-*Booker* starting point for sentencing. The parties to a binding plea agreement do not yet have the PSR or a fully developed calculation and applicable guideline range. With the rule change and process proposed in this article, mirroring the sentencing court's process is essential. Perhaps parties considering a binding plea agreement could request a draft PSR from U.S. Probation that reflects the calculation portions of the PSR only.

287. Gleeson, *supra* note 22, at 660.

288. *Id.* at 639, 660–61.

289. As previously discussed in Part III.A, Congress encouraged parties in criminal cases to negotiate and agree, subject to court approval, "that a specific sentence or sentencing range is the appropriate disposition of the case." FED. R. CRIM. P. 11(c)(1)(C).

Binding plea agreements in federal court went from an essential part of federal criminal practice to prosecutorial taboo during the mandatory Guidelines era.[290] This perception change would best come from a change to DOJ protocol and a more definitive statement about binding plea agreements from the Attorney General.

The memoranda from the DOJ during the mandatory Guidelines era limited prosecutorial discretion and discouraged binding plea agreements. The Justice Department under President Barack Obama could reinvigorate the binding plea agreement, encourage its use in federal criminal practice, and remove the prosecutorial stigma associated with the practice. First, the DOJ could release a new policy statement in Section 9-16.000 of the U.S. Attorney's Manual, entitled "Pleas—Federal Rule of Criminal Procedure 11."[291] Second, DOJ could incorporate by reference and release guidance in a section, or expansion of an existing section, its corresponding Criminal Resource Manual.[292] Third, and most important, the Attorney General should author a memorandum designed to encourage binding plea agreements in appropriate cases.[293]

On May 10, 2010, Attorney General Eric Holder released a memorandum entitled "Department Policy on Charging and Sentencing" that addressed prosecutorial discretion and DOJ protocol for, among other things, entering into plea agreements and sentencing.[294] This Attorney General memorandum states:

> In the typical case, the appropriate balance among these purposes will continue to be reflected by the applicable guidelines range, and prosecutors should generally

290. *See id.* (discussing the negative effect of the mandatory Guidelines era and emphasizing the value of sentence bargaining).

291. *See* U.S. DEP'T. OF JUSTICE, CRIMINAL RESOURCE MANUAL 623 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm.

292. *See id.* (reciting the federal criminal rules governing pleas, including binding plea agreements in a section called "Pleas—Federal Rule of Criminal Procedure 11," but remaining silent to the practice of entering into such agreements).

293. The Attorney General memorandum could empower local prosecution offices to establish supervisory and committee review of such decisions in the same fashion these offices have long valued sentencing recommendations in motions for downward departure based upon substantial assistance.

294. Holder 2010 Memo, *supra* note 90.

> continue to advocate for a sentence within that range. The advisory guidelines remain important in furthering the goal of national uniformity throughout the federal system. But consistent with the Principles of Federal Prosecution and given the advisory nature of the guidelines, advocacy at sentencing—like charging decisions and plea agreements—must also follow from an individualized assessment of the facts and circumstances of each particular case. All prosecutorial requests for departures or variances . . . must be based upon specific and articulable factors, and require supervisory approval.[295]

An amendment to Rule 11, as proposed above, could complement this recent expression of a federal prosecutor's obligations during plea negotiations and at sentencing. A new Attorney General memo could establish, or encourage components of the DOJ and U.S. Attorney's Offices to establish, the following policies and practices:

> (1) explore binding plea agreements in appropriate criminal cases that may reasonably be resolved by guilty plea;
> (2) educate the local federal judiciary about the merits of binding plea agreements *in some cases* in terms of contract rights, efficiency, and the interests of justice;
> (3) establish internal guidance about approval procedures, binding plea agreement committees, typical cases appropriate for negotiated resolution and valuation of sentencing considerations, specific sentences, and plea agreement provisions; and
> (4) promote sound contractual principles in plea bargaining and the notions of predictability and informed decision making for the defendant at sentencing.

D. Proposed Local Rule

The proposals outlined above should also be accompanied by a local rule. Local rules are typically drafted by the judiciary and reviewed by the relevant offices.[296] Assuming these groups also

295. *Id.* at 2–3.
296. For a local rule of criminal practice, as proposed here, the U.S. Attorney's

favor increased predictability and informed decision making for the defendant, as well as enhanced prosecutorial ability to enter into binding plea agreements, the proposed rule may read as follows:

> **Proposed Local Rule [#]**
>
> **(A) In a criminal case involving the adjudication of a felony offense, the district court shall follow a three-step process before imposing sentence and on the record. First, it must make findings as to the applicable U.S. Sentencing Guidelines' provisions and applicable Guidelines' range. Second, the court must decide any motions departure or variance filed by either party. Third, the court must consider and weigh the factors to be considered in § 3553(a) of Title 18, United States Code. The court shall then impose a reasonable sentence supported by the process and considerations above and in the interests of justice.**
>
> **(B) Parties to a criminal case in this district are encouraged to explore, negotiate and contract for a "specific sentence or sentencing range" in a binding plea agreement pursuant to Fed. R. Crim. P. Rule 11(c)(1)(C). Under Rule 11(c)(1)(C), the government and a defendant may contract for a "specific sentence or sentencing range" that is binding on the court, so long as it is in writing, reflects the process that the court would follow and the factors the court would consider at sentencing, as set forth in subsection (A).**
>
> **(C) The district court shall accept a binding plea agreement if the agreement complies with subsection (B), reflects the process described in subsection (A), and the imposed sentence is reasonable.**

Office, Office of the Federal Defender, Chief Judge of the district or other delegates, local chapter of the Federal Bar Association, and any other local criminal defense organization or informal leaders in the federal criminal bar for the district should review any proposed local rule.

E. Proposed Plea Agreement Language

Assuming a new standard for accepting binding plea agreements is established and a necessary perception change occurs, the parties to a binding plea agreement must do their part. The prosecution and the defense must demonstrate that the binding plea reflects the same process that the court would undergo at sentencing. The parties must memorialize the post-*Booker* considerations and discuss the factors that *support* the specific sentence or sentencing range featured in the binding plea agreement.

Like the transcript of the district court's sentencing proceeding for appellate review, the binding plea agreement must satisfy the reviewer that the proper process was followed. Specifically, the parties must *actually* calculate and consider the applicable Guidelines range, viable grounds for departure, § 3553(a) factors, and memorialize these considerations in the plea agreement.[297] The agreement must reflect a logical pathway from the considerations to the specific sentence.

The parties should consider selecting a sentencing range under Rule 11(c)(1)(C).[298] The majority of district court judges, as well as federal prosecutors, have only known the mandatory Guidelines and its ranges. A binding plea agreement to a "sentencing range" has several advantages: the district court maintains its most familiar sentencing function, the range can span a gap in plea negotiations, and the district court, after imposing a sentence within a prescribed range, is more likely to find the sentence reasonable on review.

297. The location of the above recitation of considerations is not important. It could be in a plea agreement, a statement of reasons incorporated by reference, or, if the reasoning need not be in the record, then in a joint letter to the court.

298. *See* United States v. Silva, 413 F.3d 1283, 1283–84 (10th Cir. 2005) (defendant stipulated in 11(c)(1)(C) plea agreement to a particular sentencing range, rather than a specific sentence); United States v. Kamer, 781 F.2d 1380, 1386-87 (9th Cir. 1986) (pre-Guidelines case where the parties agreed to a sentencing range of no more than three years and the court imposed eighteen months); United States v. Burruezo, 704 F.2d 33, 34 (2d Cir. 1983) (pre-Guidelines case setting forth the agreement that "any prison sentences imposed on [the] pleas of guilty shall not exceed ten years"); United States v. Howard, No. H-03-93, 2009 WL 1683798, at *5 (S.D. Tex. June 1, 2009) (another Enron prosecution resolved by binding plea agreement, but to a "sentencing range" of four to twelve months of home confinement and/or probation).

Lastly, the parties should place information on the record not typically before the court in a pre-sentence report. For instance, the government could articulate generally in a binding plea agreement that the specific sentence is partly based on a risk at trial, victim considerations, or due to concerns of efficiency and use of resources. This type of information contributes to the court's understanding of why the determinative sentence is "reasonable" in the case before it.

VII. CONCLUSION

In addition to increased judicial discretion and overall lower sentences, the pendulum *also* can swing toward predictability and informed decision making for the defendant. The new process in federal sentencing must allow a defendant to pursue, negotiate, and contract for *what the defendant believes* is a uniform, proportional, and fair sentence. A renewed role for binding plea agreements in federal court could complement the progressive developments following *Booker* and restore some predictability and informed decision making for the individual defendant.