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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. 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

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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), federal prosecutors and defendants entered into plea agreements that included a “specific sentence or sentencing range.” Binding plea agreements served an important function of counterbalancing the vast judicial discretion at sentencing. The federal judiciary enjoyed wide discretion in imposing a sentence; 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. Congress mandated

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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. 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

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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).
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.\textsuperscript{17}

We do not have to be resigned to the above conversation as the post-	extit{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.\textsuperscript{18} Increased use of binding plea agreements in federal court could complement the progressive developments following 	extit{Booker} and restore some predictability and informed decision making to federal sentencing.\textsuperscript{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, carry an unwarranted stigma among prosecutors,\textsuperscript{20} and remain underutilized and largely unavailable to

\textsuperscript{17}. See infra Part V (discussing a renewed role for binding plea agreements post-	extit{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).


\textsuperscript{19}. See infra Part V (proposing a renewed role for binding plea agreements post-	extit{Booker}).

\textsuperscript{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 \textit{Booker}). In \textit{Coney}, the district court judge ultimately accepted a binding plea agreement calling for a sentence below the Guidelines. See \textit{Coney}, 390 F. Supp. 2d at 850 (finding “justifiable reasons” to accept the binding plea agreement).

\textsuperscript{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 \textit{FED. R. CRIM. P. 11(c)(1)(C)}).
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. The evolution from pre-Guidelines to post-Guidelines federal sentencing can be described as “coming full circle.” Yet, for the
individual defendant, the post-Booker state of federal sentencing is lacking in consistency and predictability. 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. 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))).

notions of the purpose of sentencing, the federal sentencing system exhibited “an unjustifiably wide range of sentences to offenders . . . convicted of similar crimes.”

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.

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. 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.” 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. Congress reacted to a negative public perception of the

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


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).


federal system’s lack of a sentencing scheme.\textsuperscript{31} These influences eventually compelled Congress to draft legislation and overhaul federal sentencing.\textsuperscript{32} Congress passed the most comprehensive federal sentencing legislation in history, the Sentencing Reform Act of 1984 (SRA),\textsuperscript{33} and therein created the Commission.\textsuperscript{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.\textsuperscript{35}

The Commission was charged with fundamentally changing federal sentencing and the wide disparity of results throughout the federal system.\textsuperscript{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\textsuperscript{37} and, in turn, a corresponding statute made the Guidelines mandatory in federal court.\textsuperscript{38} Congress expressly tasked the Commission with collecting federal sentencing data. The Commission’s ongoing function was to assess and adjust the Guidelines accordingly.\textsuperscript{39} The Commission did, and still does, just that.\textsuperscript{40}

\textsuperscript{31} See S. REP. NO. 98-225, at 38.
\textsuperscript{32} See id.
\textsuperscript{33} See id. at 39.
\textsuperscript{34} See id.
\textsuperscript{35} 18 U.S.C. § 3553(a) (2009).
\textsuperscript{36} See S. REP. No. 98-225, at 39.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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. Yet, once the Commission embarked upon the enormous task of reducing federal convictions into a complex matrix calculation, the result was inevitable. The Commission, with some foresight and flexibility, designed its work to develop based upon appellate court interpretation and further legislative action. The Commission’s mandate and continued functions are designed to promote the goals of uniformity and proportionality at sentencing.

B. Uniformity and Proportionality Under the Mandatory Guidelines

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

(quotting 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”).


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.\textsuperscript{47} A uniform sentencing system promotes honesty, fairness, and justice.\textsuperscript{48}

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


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 combined with narrowly constructed grounds for departure. Similarly situated defendants, those who committed similar offenses with similar characteristics and having similar criminal histories were treated uniformly, or as consistently as possible, throughout the country. Amendments


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/cousa/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. In practice, however, the mandatory Guidelines were not without loopholes that undercut true uniformity.

C. Predictability and Informed Decision Making

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

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.

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”).


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”).

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.

D. “One Size Fits All” Did Not Fit

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

60. In the federal criminal system, sentencing and cooperation are intertwined throughout the progression 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. A “one size fits all” approach unfairly simplified and categorized the difficult task of sentencing individual defendants. The Guidelines dictated the process and hamstrung the parties for almost twenty years while mandatory and, to some degree, still do so today.

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. The Guidelines severely usurped most post-indictment situations reserved for prosecutorial discretion, 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. The federal sentencing scheme was condemned as overly formulaic, inflexible, and harsh. 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. 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. The limited judicial role also may best explain why the Court rendered the Guidelines advisory in *Booker*.

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

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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”).


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


decision in *Santabello*:\textsuperscript{74} the government and the defense were encouraged to openly negotiate and contract for mutually favorable terms at the time of a guilty plea.\textsuperscript{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,\textsuperscript{76} decided that in federal court, unlike prior practice and most state court systems, the judge would have no role in plea discussions.\textsuperscript{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.\textsuperscript{78} Congress provided that

\begin{itemize}
  \item \textsuperscript{74} Santobello v. New York, 404 U.S. 257 (1971).
  \item \textsuperscript{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.”).
  \item \textsuperscript{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.”).
  \item \textsuperscript{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.”).
  \item \textsuperscript{78} See Fed. R. Crim. P. 11(e)(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?* (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.\textsuperscript{79} Presiding over fewer criminal trials and disinvited from plea discussions, the district court served its most important function at sentencing.\textsuperscript{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.\textsuperscript{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\textsuperscript{82} and the mandatory scheme’s predictability further incentivized guilty pleas.\textsuperscript{83} Yet the central functions of federal sentencing were outsourced to the Commission for creating the Guidelines\textsuperscript{84} and to the U.S. Probation and Pretrial Services for running the initial calculations.\textsuperscript{85}

\textsuperscript{79} See FED. R. CRIM. P. 11(c)(1).

\textsuperscript{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, \textit{Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining}, \textit{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.

\textsuperscript{81} FED. R. CRIM. P. 11(c)(1).

\textsuperscript{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”).


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_05_32/$FILE/AG_Guidance_Stcg_Reccs.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).


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).

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. 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.

The DOJ sought to regulate decisions that traditionally rested in the discretion of the prosecutor. In 2003, Attorney General John Ashcroft distributed a memorandum that standardized some prosecutorial discretion by requiring the government to argue for “guideline sentences.” The memorandum also required the government to oppose all defense motions for lower sentences and report when district court judges imposed sentences below the
guideline range.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{99} When mandatory, the Guidelines invited impropriety and disparate treatment in these areas.\textsuperscript{100}

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.”).

\textsuperscript{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. 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.

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, or, as discussed below, a conviction and an admission of guilt are more important than a particular sentence. The mandatory Guidelines instead dictated plea discussions, leaving little room for the government’s opinion about an appropriate sentence, much less a “milk of human kindness.”

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. The subset of criminal cases that most incensed judges at sentencing were actually abuses of prosecutorial discretion. 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 Moolhr, 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, it also encouraged *sub rosa* deals, fact-bargaining, and improper pre-agreement ratification by the court. 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. 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, 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 eradication, the mandatory Guidelines reduced the court’s discretion and ability to individualize sentences.

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. Rule 11 forms the minimum requirements for the district court’s plea colloquy with a defendant. Congress, in promulgating Rule 11, included provisions encouraging specific terms in plea agreements. Originally enacted as Rule 11(e), Rule 11(c) “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.” Rule 11(e)(1), added with the 1974 amendments, and later changed to Rule 11(c)(1), included language about plea agreement provisions for negotiated outcomes, including “specific

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).
118. See Fed. R. Crim. P. 11, ADVISORY COMM. NOTES (1974) (“Subdivision (c) 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.”\footnote{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).”\footnote{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.\footnote{121}

The procedural hurdle to the binding plea agreement was, and still is, the sentencing judge’s acceptance of the agreement.\footnote{122} The court accepts a binding plea agreement in a separate, and often later, act from accepting the guilty plea.\footnote{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.\footnote{124}

\footnotetext{119}{\textit{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”); \textit{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).}

\footnotetext{120}{\textit{Fed. R. Crim. P.} 11(c)(1)(C).}

\footnotetext{121}{\textit{See id.}}

\footnotetext{122}{\textit{Fed. R. Crim. P.} 11, \textit{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. \textit{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. \textit{See} Perez \textit{v. State}, 866 N.E.2d 817, 820 (Ind. Ct. App. 2007), \textit{transfer denied} (July 25, 2007).}

\footnotetext{123}{\textit{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. \textit{U.S. Sentencing Comm’r}, \textit{supra} note 1, \textsection 6B1.2 cmt.}

\footnotetext{124}{\textit{Compare} \textit{Fed. R. Crim. P.} 11(b), \textit{with} \textit{Fed. R. Crim. P.} 11(c)(3)(A) (describing the court’s discretion to accept or reject a binding plea agreement). \textit{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. Rule 11 and its advisory notes are silent as to the standard for accepting binding plea agreements. 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. In essence, the parties enjoyed the same discretion to contract for an appropriate sentence as the judge had to impose one.

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, and still do today. The Guidelines recommended that the court defer acceptance of the binding plea agreement until the court has reviewed the pre-sentence report. 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. 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 . . . .”

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.” 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(c)(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]). 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 . . . .”

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. Some courts did not consider this policy statement in Section 6B1.2 as mandatory or binding.

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

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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 65–65 (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. \(\text{Id.}\)  \(\text{Id.}\)  \(\text{Id.}\)

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.” \(\text{Id.}\)


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;\footnote{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.}{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 \textit{UNITED STATES V. BOOKER}

Prior to 2005, the mandatory Guidelines constrained federal district courts’ sentencing discretion for nearly twenty years.\footnote{See United States v. Booker, 543 U.S. 220, 226 (2005).} Booker rendered the Guidelines “advisory” and restored discretion to the trial courts at sentencing.\footnote{See id.} 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.\footnote{See id. at 246–47; see also infra Part IV.B (discussing the incongruent remedy in \textit{Booker} and how the constitutional violations could have been entrusted to prosecutorial discretion).} The effect of the Court’s remedy in \textit{Booker} was unrelated to the constitutional challenge upon which review was granted.\footnote{See infra Part IV.B (discussing the incongruent remedy in \textit{Booker}).} The effect of \textit{Booker}, however, is progressive and dramatic.

A. \textit{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 \textit{Booker}.\footnote{Booker, 543 U.S. at 245–46; see also James L. Buchwalter, Annotation, \textit{Construction and Application of Sixth Amendment Right to Trial by Jury—Supreme Court Cases}, 6 A.L.R. Fed. 2d 213 (2005).} The line of cases began in the 1990s and surfaced every few years, causing some havoc in federal practice.\footnote{See, e.g., Jones v. United States, 526 U.S. 227, 242 (1999) (discussing the Sixth Amendment concerns raised in \textit{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. Instead, the challenge concerned the process employed by district court judges in making findings of fact in accordance with the Commission’s formula. The eventual remedy in Booker, as discussed below, bears no relation to these procedural challenges.

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


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. 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. Congress, over time, began to clearly establish its legislative intent to promulgate sentencing factors instead of additional elements and new crimes. 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.

In 1998, in Almendarez-Torres v. United States, 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. 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. 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.

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).
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 (“If 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."\(^{502}\).

\(^{165}\) 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 251–32.

\(^{170}\) 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. 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.\(^\text{175}\)

On June 24, 2004, the Supreme Court decided Blakely v. Washington, 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.\(^\text{177}\) 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.\(^\text{178}\) 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.\(^\text{179}\)

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


\(^\text{175}\) 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).


\(^\text{177}\) Id. at 313–14.

\(^\text{178}\) Id. at 300.

\(^\text{179}\) 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)).
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. In Jones, the Court analyzed aggravating factors in a federal statute, and the Guidelines again were not at issue. More at issue in Jones, Apprendi, and Blakely were concerns for unfair surprise by the government and lack of notice to the defendant. 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.

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

to be freed from the mandatory scheme’s reign, began to disregard the Guidelines in federal sentencing proceedings. \textsuperscript{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 \textit{Booker}, as well as another case presenting similar issues, \textit{United States v. Fanfan}. \textsuperscript{188}

On January 12, 2005, a split majority of the Supreme Court decided \textit{Booker} and applied \textit{Blakely} to the mandatory sentencing scheme under the Guidelines. \textsuperscript{189} In \textit{Booker}, a narcotics prosecution, the Court reviewed the government’s appeal after the Seventh Circuit, relying on \textit{Blakely}, reversed a sentencing enhancement under the Guidelines that the judge applied at sentencing. \textsuperscript{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. \textsuperscript{191} The district court sentenced Booker to thirty years, below the maximum punishment in his case from its inception, life imprisonment. \textsuperscript{192}

The first majority opinion in \textit{Booker}, although addressing the Sixth Amendment violation and extending the \textit{Almendarez-Torres} rule to Guideline enhancements, foreshadowed the ultimate remedy adopted by the Court. \textsuperscript{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.” \textsuperscript{194} In \textit{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.” \textsuperscript{195} The Court linked the sentencing

\begin{flushleft}
\textsuperscript{188} \textit{Id.} at 229 (consolidating \textit{Fanfan} and \textit{Booker} on appeal).
\textsuperscript{189} \textit{Id.} at 226.
\textsuperscript{190} \textit{Id.} at 227.
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Id.} at 244.
\textsuperscript{194} \textit{Id.} at 233.
\textsuperscript{195} \textit{Id.} at 246.
\end{flushleft}
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))).
199. Booker, 543 U.S. at 246.
200. Id. at 246–47.
the first majority found judicial findings of applicable enhancements.\textsuperscript{201}

After the Court’s decision six months earlier in\textit{ Blakely}, some district courts already required the government to present and juries to find applicable guideline enhancements using the beyond a reasonable doubt standard.\textsuperscript{202} In other words, in some jurisdictions, the government was already doing what the Court considered “impossible” in\textit{ 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 \textit{on just the enhancement} as opposed to the elements of the crime.\textsuperscript{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.\textsuperscript{204}

Not discussed in\textit{ 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.

\textsuperscript{201} Id. at 246.
\textsuperscript{202} See supra note 222 (citing post-\textit{Blakely} cases).
\textsuperscript{203} See, \textit{e.g.}, Washington v. Recuenco, 548 U.S. 212, 215 (2006) (deciding a post-\textit{Blakely}, pre-\textit{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.
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. 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. The
result was that the Guidelines, after almost twenty years of
mandatory application at federal sentencing, were rendered
“effectively advisory.”

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. 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. Booker even liberated some federal
prosecutors from a rigid aspect of federal criminal justice.

The Booker court further devoted its attention to the process
of federal sentencing in the wake of its remedy. 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.” 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.
“[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.”\textsuperscript{213} Congress previously set forth seven “factors to be considered” in § 3553(a) of Title 18, United States Code.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{216} The sentencing court, after \textit{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.

\textsuperscript{213} \textit{Id.} at 245.
\textsuperscript{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. \textit{Id.}
\textsuperscript{216} \textit{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.\(^{222}\)


\(^{218}\) *Booker*, 543 U.S. at 260–61.

\(^{219}\) *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. 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. The district court, after navigating the procedural steps, now enjoys the freedom to impose a sentence between the statutory minimum (often no jail time) and the statutory maximum.

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223. See, e.g., United States v. Parris, 573 F. Supp. 2d 744, 750–52 (E.D.N.Y. 2008). The district court reasoned, “[If] 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 States 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 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*.

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. 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.

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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.\textsuperscript{229} While the Commission wishes to interpret the data as status quo,\textsuperscript{230} the sentences imposed since Booker reflect that judicial discretion and prosecutorial flexibility favor the defendant and should continue to do so.\textsuperscript{231} The judiciary has spoken more clearly about certain types of prosecutions and defendants.\textsuperscript{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."\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{231} See supra note 229.

\textsuperscript{232} Booker Report, supra note 227, at ix–xi.

\textsuperscript{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&hlxlogin=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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{238}

\textsuperscript{234} Booker Report, supra note 227, at v.
\textsuperscript{235} Id. at vi.
\textsuperscript{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).
\textsuperscript{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.  

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. 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. 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. There are several reasons that uniformity and proportionality will not endure.

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. The individual defendant’s perception of sentencing, however, has not

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 (”The 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. Post-Booker, the structured process again depends as much upon the judge as it does upon sentencing considerations.

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. 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.

Putting motivation aside, the government and the defendant must be permitted to negotiate the plea agreement’s most important term without significant limitation. 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. The district court’s acceptance of a binding plea agreement could have both the procedural and substantive component of the review. First, the district court could review whether the parties in the plea agreement navigated through the same procedural hoops required of it. Second, the district court could evaluate the “specific sentence or sentencing range” in the plea agreement for “reasonableness.” 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. 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. 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. 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.


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


255. See Freeman, supra note 254.

As to the three defendants, the matter was resolved by binding plea agreements.\textsuperscript{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.\textsuperscript{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.\textsuperscript{259} The case should exemplify the importance and potential impact of binding plea agreements post-\emph{Booker}.

\textbf{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,

\begin{itemize}
    \item \textsuperscript{257} See Plea Agreement, United States v. Bermingham, No. 02CR00597, 2007 WL 4983408 (S.D. Tex. Nov. 28, 2007); \textit{cf.} Moohr, \textit{supra} note 104, at 941–42 (praising the Guidelines’ uniform and unbiased treatment of white collar crime cases).
    \item \textsuperscript{258} Gleeson, \textit{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. \textit{Id.}
    \item \textsuperscript{259} Pursuant to the plea agreements in \textit{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, \textit{Bermingham}, 2007 WL 498430, at *38.
\end{itemize}
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. 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 peace of mind in having negotiated a known result. 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.

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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.\textsuperscript{263} Contract principles dictate that either party may rescind the plea agreement before the court’s acceptance of the agreement,\textsuperscript{264} yet, once accepted, the contact is formed and mutually enforceable.\textsuperscript{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\textsuperscript{266} or, at the very least, the determinative sentence will be presumptively reasonable.\textsuperscript{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.\textsuperscript{268} Nor will it be adjusted for other post-sentencing “corrections” under Rule 35(b).\textsuperscript{269} Once agreed to and accepted with the sentence imposed,
the agreement will be enforced.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{273}

\begin{itemize}
\item \textsuperscript{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))).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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). 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. Trial courts are imposing below-Guideline sentences in more than forty percent of cases. No criminal defendant today would negotiate for a Guidelines sentence when statistics show it to be the worst-case scenario. 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. District courts still evaluate the merits of the specific sentence called for in a binding plea agreement. 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.

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. Substantively, the district court should review the specific sentence or sentencing range in the agreement with an abuse of discretion type of standard.

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. 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.

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


(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. 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*.

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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. 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. The inapplicable standard reflected in Guidelines policy carries no practical effect following *Booker*. The Guidelines should restore the parties’ “power to enter into sentence bargains pursuant to Rule 11(c)(1)(C)” as Congress intended.

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. 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) (“Reasonableness 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.


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. 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.” Second, DOJ could incorporate by reference and release guidance in a section, or expansion of an existing section, its corresponding Criminal Resource Manual. Third, and most important, the Attorney General should author a memorandum designed to encourage binding plea agreements in appropriate cases.

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. 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

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


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.

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.

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. 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. 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). 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.