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Brian Gallini



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HERDING BULLFROGS TOWARDS A MORE BALANCED WHEELBARROW:¹

AN ILLUSTRATIVE RECOMMENDATION FOR FEDERAL SENTENCING POST-*BOOKER*

Brian R. Gallini & Emily Q. Shults

In hindsight, the groundwork preceding the so-called “landmark” decision in *United States v. Booker*, 543 U.S. 220 (2005), invalidating portions of the United States Sentencing Guidelines (the “Guidelines”) was laid long before its issuance. Consider, for example, the surprising resignation of former United States District Judge John S. Martin, who told The Associated Press that “Congress is mandating things simply because they want to show how tough they are on crime with no sense of whether this makes sense or is meaningful.”² Shortly thereafter came Justice Kennedy’s address to the American Bar Association, during which he observed “the compromise that led to the guidelines led also to an increase in the length of prison terms. We should revisit this compromise. The Federal Sentencing Guidelines should be revised downward.”³

Other examples abound. In 2004, the non-profit group Families Against Mandatory Minimums completed a lengthy study of Arizona’s mandatory minimum sentencing laws and concluded that such laws fuel the prison overcrowding crisis, fill prisons with non-violent substance abusers, and cost millions of dollars while doing little to enhance public safety.⁴ That same year, the American College of Trial Lawyers compiled an exhaustive critique of the Sentencing Guidelines concluding that they are “fundamentally flawed.”⁵ In similar fashion, the CATO Institute published a critique of federal sentencing in 2002, which likewise concludes that “[i]t is time to scrap the commission and its Guidelines, and to embark on a new age of moral judgment in sentencing.”⁶

1. The Sixth Circuit humorously stated in a recent opinion that “[a]chieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow.” *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006).

2. Greg Gittrich, *WTC Judge Quits Bench*, N.Y. DAILY NEWS, June 25, 2003, at 26. In connection with his resignation, Judge Martin also observed that, “[f]or a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice.” John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

3. Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Keynote Address at the American Bar Association Annual Meeting (Aug. 9, 2003).

4. FAMILIES AGAINST MANDATORY MINIMUMS, ARIZONA PRISON CRISIS: A CALL FOR SMART ON CRIME SOLUTIONS (2004), available at <http://www.famm.org/Repository/Files/AZbrieffinal13.pdf>.

5. AMERICAN COLLEGE OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 35 (2004).

6. Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, POL’Y ANALYSIS (CATO Institute, Wash. D.C.), Nov. 1, 2002, at 24, available at <http://www.cato.org/pubs/pas/pa458.pdf>. Perhaps the truest precursor to the Guidelines’ failure began with Justice Scalia’s dissent in *Mistretta v. United States*, 488

The foregoing examples are merely illustrative; the authorities criticizing the Guidelines are far too many to mention.⁷ Given this, it was hardly a surprise then that the Supreme Court took a significant step toward declaring the Guidelines unconstitutional when it issued *Blakely v. Washington*, 542 U.S. 296 (2004). In striking down Washington State's sentencing guidelines, the Court held that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."⁸ As a result, the central question immediately became what impact, if any, the *Blakely* decision would have on the constitutionality of the Guidelines.⁹ Predictably, the judiciary responded with conflicting results; during the interim period after *Blakely*, but before *Booker*, the Sixth Circuit determined that "*Blakely* does not compel the conclusion that the Federal Sentencing Guidelines violate the Sixth Amendment."¹⁰ Conversely, however, the Ninth Circuit found that "there is no principled distinction between the Washington Sentencing Reform Act at issue in *Blakely* and the United States Sentencing Guidelines."¹¹

The Circuit split was settled on January 12, 2005, when the Supreme Court concluded that the holding in *Blakely* applies to the Guidelines.¹² The so-called "remedial" majority opinion further articulated that the Guidelines could no longer operate as mandatory sentencing rules.¹³ Instead, according to the Court, the Guidelines would, going forward, require a sentencing court to consider Guideline ranges, but permit the court "to tailor the sentence in light of other statutory concerns as well."¹⁴ Under this new regime, a district court's sentencing determination would be viewed from the standpoint of reasonableness.¹⁵

Courts initially believed that "*Booker* [was] not an invitation to do business as usual"¹⁶ and, in fact, went so far as to hold that any defendant sentenced pursuant to

U.S. 361 (1989), the decision upholding the constitutionality of the Sentencing Commission and its Guidelines. In his scathing dissent, Justice Scalia observed that "the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress." *Id.* at 427 (Scalia, J., dissenting); see also *United States v. Marshall*, 908 F.2d 1312, 1332-33 (7th Cir. 1990) (Posner, J., dissenting) (noting some lines drawn by the Guidelines "seem crazy" and "loony").

7. For an impressive compilation of authorities dissecting and criticizing the Guidelines, see the 177-page opinion authored by Chief Judge William Young of the U.S. District Court of the District of Massachusetts who, before the issuance of *Blakely*, ruled that the logic of *Apprendi* and *Ring* rendered the Federal Sentencing Guidelines unconstitutional. *United States v. Green*, 346 F.Supp. 2d 259 (D. Mass. 2004).

8. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

9. See, e.g., Maureen O'Hagan, *Lawyers Try to Sort Out Effects of Court Ruling on Sentencing*, THE SEATTLE TIMES, June 26, 2004, at B1, available at http://seattletimes.nwsources.com/html/localnews/2001966086_judges26m.html; Adam Liptak, *Sentencing Decision's Reach Is Far and Wide*, N.Y. TIMES, June 27, 2004, §1, at 16; David G. Savage, *Thousands of Cases in Doubt After Decision on Sentencing*, L. A. TIMES, June 26, 2004, at 15.

10. *United States v. Koch*, 383 F.3d 436, 438 (6th Cir. 2004) (en banc) (subsequent history omitted).

11. *United States v. Ameline*, 376 F.3d 967, 974 (9th Cir. 2004) (subsequent history omitted).

12. *United States v. Booker*, 543 U.S. 220, 243-44 (2005) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

13. *Id.* at 245.

14. *Id.* at 245-46.

15. *Id.* at 261 ("And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to appellate courts: review for 'unreasonable[ness].'" (quoting 18 U.S.C. § 3742(e)(3)(1994 ed.)).

16. *United States v. Ranum*, 353 F.Supp.2d 984, 987 (E.D. Wis. 2005) ("District courts cannot just add

mandatory Guidelines constituted plain error in violation of a defendant's Sixth Amendment rights.¹⁷ The past year's post-*Booker* jurisprudence has, however, reflected the judiciary's unshakeable addiction to the Guidelines.¹⁸ Indeed, in contravention of *Booker's* expressed intention to have district courts rely almost exclusively on jury fact-finding,¹⁹ appellate courts now consistently divest the discretion otherwise afforded to sentencing courts by resolving the applicability of sentencing enhancements,²⁰ and examining so-called "acquitted conduct" to impose a penalty.²¹ Perhaps more problematically, appellate courts have seemingly wholly ignored the inter-relation between the Court's holding in *Booker* and its earlier decision

up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual."); *see, e.g.*, *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) (attempting to provide general guidance to district courts and noting that district courts cannot satisfy their duty to consider the Guidelines by general reference to them); *United States v. Oliver*, 397 F.3d 369, 382 & n.5 (6th Cir. 2005) (finding that facts supporting an enhancement existed, such that enhancement could be applied, but leaving it to the district court as to whether it ought to be applied now that the Guidelines are advisory); *United States v. Cano-Silva*, 402 F.3d 1031, 1039 (10th Cir. 2005) ("Under *Booker*, the Sentencing Guidelines are no longer mandatory, and the district judge will be free to determine whether the defendant is eligible for a minor-participant adjustment without any concern that the result would compel what the judge considers an unwarranted sentence.").

17. *United States v. Barnett*, 398 F.3d 516, 530 (6th Cir. 2005) ("Because we are convinced that sentencing Barnett under mandatory Guidelines 'seriously affect[ed] the fairness, integrity [and] public reputation of judicial proceedings,' now that we know those Guidelines are advisory, we exercise our discretion to notice the plain sentencing error in the present case and vacate Barnett's sentence." (citation omitted)). *But see* *United States v. Mares*, 402 F.3d 511, 522 (5th Cir. 2005) (requiring defendants to demonstrate prejudice from the application of mandatory guidelines (the reasonable probability of a different outcome) to satisfy the third step of plain-error review).

18. Several circuits now view a district court's sentence within the Guidelines as *per se* reasonable. *See, e.g.*, *United States v. Johnson*, 445 F.3d 339, 341-44 (4th Cir. 2006) (adopting and exploring justifications for presumption of reasonableness); *Mares*, 402 F.3d at 519 ("If the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines."); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006) ("We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness."); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) ("The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness."); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005) ("[Defendant's] sentence . . . was within the guidelines range for his offense level of 38 and criminal history category IV, and as a result, we think that it is presumptively reasonable."); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) ("[A] sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness."); *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005) (holding properly calculated Guidelines sentence "ordinarily" will be reasonable). *But cf.* *United States v. Rubenstein*, 403 F.3d 93, 101-02 (2d Cir. 2005) (Cardamone, J., concurring) ("Correct application of the Guidelines is but one factor to be considered under 18 U.S.C. § 3553 in reviewing reasonableness, and it is entirely possible that a correctly calculated Guidelines sentence might nonetheless be found unreasonable upon consideration of other factors." (citation omitted)).

19. 543 U.S. at 244. Although, as the Court observed, "jury factfinding may impair the most expedient and efficient sentencing of defendants," the judiciary's common interest "in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly." *Id.*

20. *United States v. Davis*, 397 F.3d 340, 352 (6th Cir. 2005) (Cook, J., concurring) (noting "judges may enhance sentences based upon facts not found by the jury, provided they do not consider themselves required to do so"). As discussed more fully below, such a statement of the post-*Booker* law appears wholly incorrect; to the extent that judicial fact-finding remains after *Booker*, it must be preceded by jury involvement or an admission by the defendant.

21. *United States v. Duncan*, 400 F.3d 1297, 1304 (11th Cir. 2005) (reaffirming, notwithstanding *Booker*, that "[r]elevant conduct of which a defendant was acquitted nonetheless may be taken into account in sentencing for the offense of conviction, as long as the government proves the acquitted conduct relied upon by a preponderance of the evidence" (quoting *United States v. Barakat*, 130 F.3d 1448, 1452 (11th Cir. 1997))).

in *United States v. Cotton*, which held that *Apprendi* “facts must also be charged in the indictment.”²²

In short, although the post-*Booker* legal landscape continues to evolve on a daily basis, the judiciary’s direction points toward some measure of consistency. Part I of this Article will provide an overview of the history and prevailing motivations behind the promulgation of the Federal Sentencing Guidelines. Using the U.S. Court of Appeals for the Sixth Circuit as an illustrative example,²³ Part II will contend that, notwithstanding the supposed “far-reaching” implications of both *Blakely* and *Booker*, the judiciary’s continued reliance on the “advisory” Guidelines has practically changed federal sentencing procedures very little in form or function. In contrast, Part III examines the State of Maine’s sentencing scheme and its response to the Supreme Court’s *Booker/Blakely* decisions. By arguing that Maine’s sentencing procedure reflects a commonsense approach to sentencing by affording substantial discretion to sentencing courts within the confines of a determinate sentencing system, this Article concludes by advocating a revision to the Federal Sentencing Guidelines to reflect a mixed determinate/indeterminate sentencing system. The Guidelines, however carefully crafted, have long been in need of substantial adjustment. This Article proffers that, rather than insisting upon their immutability, federal sentencing would do well to reflect upon its own history, and the evolution of its state counterparts. After all, “little inconveniences in the forms of justice... are the price that all free nations must pay for their liberty in more substantial matters....”²⁴

I.

The present muddled state of the Federal Sentencing Guidelines, culminating in the milestone decisions of *Booker* and *Blakely*, has a long and subtle history. This section does not purport to serve as a comprehensive guide, but instead attempts to provide an overview of the competing philosophies and concerns that have influenced the evolution of federal procedure.²⁵ The recitation of the broad history of federal sentencing, contrasted with the relatively short history of the Federal Sentencing Guidelines, bolsters the case for viewing the federal sentencing structure as an improving continuum, not an immutable scheme. As such, improvements are still to come, and, as this Article later suggests, federal sentencing would be wise to look to its state counterparts for alternatives and potential improvements to the Guidelines.

A. An Overview of Early Sentencing

In the early stages of federal sentencing, judges possessed wide discretion in the

22. *United States v. Cotton*, 535 U.S. 625, 627 (2002). Thus, not only must all facts increasing the Guidelines range for the offense of conviction be submitted to the jury or admitted by the defendant, they must also be charged by the grand jury in the indictment. *Id.*

23. Significantly, a leading academic chronicler of sentencing decisions believes “the Sixth Circuit is doing some of the best post-*Booker* work of any of the circuits.” Douglas A. Berman, Strong *Booker* work from the Sixth Circuit, *Sentencing Law and Policy*, May 26, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/week21/index.html/.

24. *Booker*, 543 U.S. at 244 (quoting 4 COMMENTARIES ON THE LAWS OF ENGLAND 343-344 (1769)).

25. For a more comprehensive chronicle, see SANDRA SHANE-DUBOW ET AL., *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT* (1985).

imposing of sentences.²⁶ For nearly two hundred years, minimal appellate review of sentencing judges' determinations existed.²⁷ This broad entrustment of sentencing discretion was a product of the termed "rehabilitative ideal" philosophy of sentencing.²⁸ The approach was based on the "concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society."²⁹ Thus, sentencing judges and parole officers "were in positions to exercise, and usually did exercise, very broad discretion."³⁰

The rehabilitative motivations fueling the broad discretion afforded to sentencing judges was particularly evident in the Supreme Court's *Williams v. New York* decision.³¹ There, the Court reviewed a trial court's sentence of death, despite a jury's recommendation of life imprisonment, based upon information about the defendant that was not presented at trial but, instead, was contained within a pre-sentence report.³² Defendant contended that he had a right to confront and cross-examine information derived from prosecution witnesses considered in the sentencing evaluation; the Court disagreed.³³ Affirming both the conviction and sentence, the Supreme Court distinguished the procedural regulations required for determining guilt from the procedural regulations governing sentencing, noting the latter was "[h]ighly relevant–if not essential–to [the sentencing judge's] selection of an appropriate sentence [because sentencing judges could possess] the fullest information possible concerning the defendant's life and characteristics."³⁴ Thus, "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."³⁵ This concept of "individualiz[ed] punishment" worked in tandem with "the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship"³⁶–a

26. See *Mistretta v. United States*, 488 U.S. 361, 363 (1989)/

For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing[,] . . . [which] nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine.

27. See *United States v. Wynn*, 11 F. 57 (E.D. Mo. 1882); see also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226 n.8 (1993) (discussing the lack of appellate review excepting a "brief period in the late 19th Century[.]" during which a federal provision was interpreted to permit "appellate courts to consider not only whether the sentence imposed was lawful–within statutory limitations–but also whether it was excessive, and, if so, to modify it").

28. See Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 654-55 (2005) (discussing medical origins of "rehabilitative ideal," which viewed the offender as a "sick" individual who might be "cured").

29. *Mistretta*, 488 U.S. at 363.

30. *Id.*

31. *Williams v. New York*, 337 U.S. 241 (1949).

32. *Id.* at 242-44.

33. *Id.* at 245-48.

34. *Id.* at 247.

35. *Id.*

36. *Williams*, 337 U.S. at 249.

sentiment nothing short of the rehabilitative ideal.³⁷

B. Reform

Beginning in the 1950s, and continuing throughout the 60s and 70s, criminal justice researchers and scholars began to voice concerns about the indeterminate sentencing structure.³⁸ Critics pointed to three fundamental concerns: (1) the lack of success in accomplishing rehabilitative goals; (2) anxiety among prisoners resulting from uncertainty and disparity in sentencing; and (3) the conceptual discrepancy between the ideals of equality and the rule of law, exemplified by “unwarranted disparities”—such as racial bias—in sentence length.³⁹ Perhaps the most vocal critic of the indeterminate sentence structure was Judge Marvin Frankel, who published a plethora of scholarship lambasting indeterminate sentencing as a system in which judges were “[s]ubject essentially to no law.”⁴⁰ Simultaneously, concerns about rising crime rates inspired advocates of tougher criminal penalties to support calls for sentencing reform.⁴¹

Following revisions in several states,⁴² the federal government initiated changes in sentencing procedures with the passage of the Sentencing Reform Act of 1984 (the “Act”),⁴³ thereby creating the U.S. Sentencing Commission, which in turn promulgated the Guidelines. Unlike the rehabilitative motivations that buoyed indeterminate sentencing, the Guidelines did not align itself with any one penal ideology.⁴⁴ On the contrary, the preceding bills and the final Guidelines listed four generally accepted justifications “to be considered” for criminal sentencing by the sentencing court.⁴⁵ These justifications—retribution, deterrence, incapacitation, and rehabilitation—were proffered without any further guidance as to the amount of weight each should be afforded.⁴⁶ In retrospect, perhaps the most glaring omission from both of the new

37. For further discussion of the interplay in the following decades between rehabilitative motivations and constitutional procedure in Supreme Court decisions, see Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 388-98 (2006).

38. Stith & Koh, *supra* note 27, at 227.

39. *Id.* (citations omitted); see Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990) (highlighting particular incidences and studies of disparate sentences).

40. Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2044 (1992); see MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972).

41. J. Edgar Hoover, *The Dire Consequences of the Premature Release of Dangerous Criminals Through Probation and Parole*, 27 F.B.I. L. ENFORCEMENT BULL. 1 (1958).

42. Minnesota created a Sentencing Guidelines Commission in 1978. See RICHARD S. FRASE, *SENTENCING GUIDELINES IN MINNESOTA, 1978-2003* (Michael Tonry ed., University of Chicago Press 2003), available at <http://ssrn.com/abstract=623281>. Pennsylvania and Washington soon followed suit. See 204 PA. CODE § 303 (1982) (codified at 42 PA. CONS. STAT. ANN. § 9721 (West 1982)); WASH. REV. CODE ANN. § 9.94A.040 (West 1988).

43. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

44. For a more detailed discussion of penal philosophies within the Sentencing Reform Act’s legislative history, see Stith & Koh, *supra* note 27, at 239. See also 28 U.S.C. § 994(k) (2000) (outlining the duties of the Sentencing Commission and specifically rejecting rehabilitation as a goal of imprisonment).

45. 18 U.S.C. § 3553(a) (2000).

46. Title 18 U.S.C. § 3553 requires that the sentencing court consider, *inter alia*, the following factors:

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

substantive state and federal sentencing laws was the lack of procedural provisions which would provide form to the newly announced substance.⁴⁷ The Act did not set forth, or even mention, a requisite sentencing procedure, save for a few passing comments,⁴⁸ largely rendered moot by existing statutory law.⁴⁹

In the mid-1980s, the Supreme Court dealt with a direct constitutional challenge to the revised sentencing guidelines in *McMillan v. Pennsylvania*.⁵⁰ The criminal defendants in *McMillan* challenged Pennsylvania's sentencing guidelines, enacted in 1982, which imposed a five-year mandatory minimum sentence if a judge found, by a preponderance of the evidence, that the criminal defendant "visibly possessed a firearm" during the commission of enumerated offenses.⁵¹ In upholding the guideline, the *McMillan* Court concluded that "States may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense," without any heightened burden of proof.⁵² The Court further relied upon *Williams*, which constitutionally blessed judicial discretion, for the proposition that, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."⁵³ Yet despite this seemingly binding precedent, the conceptual motivations underpinning *Williams* were not present in *McMillan*. Professor Douglas A. Berman aptly notes that, contrary to the rehabilitative threads which infused the *Williams* decision and purportedly justified broad judicial discretion, the mandatory minimum sentence in Pennsylvania was promulgated with the specified goals of "protect[ing] the public from armed criminals and... deter[ring] violent crime... as well as to... punish[] those who commit serious crimes with guns."⁵⁴

The constitutional approval of determinate sentencing crested with the Supreme Court's 1997 decision, *United States v. Watts*.⁵⁵ There, again relying on *Williams*, the Court upheld a federal guideline requiring an increase in the criminal defendant's sentence if the judge found, by a preponderance of the evidence, that the defendant had committed certain underlying charges, even if the defendant was acquitted.⁵⁶ In his dissent, Justice Stevens criticized the majority's reliance on *Williams*, noting that "its rationale depended largely on agreement with an individualized sentencing regime that is significantly different from the Guidelines system."⁵⁷ Moreover, according to Justice

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

§ 3553(a)(2)(A)-(D).

47. Professor Berman contends that the lack of procedural guidance in state and federal sentencing guidelines immediately resulted in conceptual chaos. Berman, *supra* note 28, at 659-61.

48. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (1992) (providing that Federal Rules of Evidence would not apply at sentencing proceedings; information was permissible providing that there was "sufficient indicia of reliability to support its probable accuracy").

49. 18 U.S.C. § 3661 (2000) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

50. 477 U.S. 79 (1986).

51. *Id.* at 81-82 & n.1.

52. *Id.* at 91.

53. *Id.* (citing *Williams v. New York*, 337 U.S. 241 (1949)).

54. Berman, *supra* note 28, at 664 (quoting *Commonwealth v. Wright*, 494 A.2d 354, 362 (Pa. 1985)).

55. 519 U.S. 148 (1997).

56. *Id.* at 156.

57. *Id.* at 165 (Stevens, J., dissenting).

Stevens, “[t]he goals of rehabilitation and fairness served by individualized sentencing that formerly justified vesting judges with virtually unreviewable sentencing discretion have been replaced by the impersonal interest in uniformity and retribution.”⁵⁸

C. The Fall

Post-*Watts*, determinate sentencing was not without its share of academic critics, yet it nevertheless appeared to have achieved a measure of legal permanence stemming from the foregoing constitutional sanctions.⁵⁹ The Supreme Court had repeatedly relied upon judicial discretion as a justification for tolerating the loose procedural form of sentencing guidelines, but had not conceptualized the effect the substantive change of the Guidelines would have on that discretion. Then, twelve years after *Watts*, the Supreme Court undertook *Almendarez-Torres v. United States*⁶⁰ and *Jones v. United States*,⁶¹ cases in which several of the Justices expressed doubts about the constitutional viability of judge-determined sentencing procedures. Both cases involved the Guidelines’ potential for sentence enhancements resulting from judge-found facts—prior convictions and “resulting bodily injury—respectively.⁶² In holding that the contested guideline was constitutional in *Almendarez-Torres* and unconstitutional in *Jones*, the Court focused its analysis on the text of the applicable statutes; namely, whether the judge-found fact constituted an element of the crime or a sentencing factor.⁶³ Ultimately, the Court avoided confronting the issue in *Jones* by emphasizing that it was not adopting a constitutional rule, but merely interpreting “a particular federal statute in light of a set of constitutional concerns.”⁶⁴

Both the *Almendarez-Torres* and *Jones* Courts foreshadowed a shift in the constitutional treatment of determinate sentencing procedures. One year later, a sharply divided Court struggled to reconcile its divergent ideologies when a state defendant challenged a New Jersey statute providing that his sentence could be enhanced if the sentencing court determined by a preponderance of the evidence that “[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”⁶⁵ Deeming the statute unconstitutional, the Court announced: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁶⁶ Although today, with the foreknowledge of the *Booker/Blakely* decisions, the impact of the rule announced in *Apprendi* seems broad, the ruling’s impact was largely contained; lower federal and state courts interpreted the new rule narrowly, and legislatures failed to take remedial action to alter sentencing guidelines

58. *Id.* at 159 (Stevens, J., dissenting).

59. See generally Berman, *supra* note 28, at 670.

60. 523 U.S. 224 (1998).

61. 526 U.S. 227 (1999).

62. See *Almendarez-Torres*, 523 U.S. at 226-27; *Jones*, 526 U.S. at 232-39.

63. See *Almendarez-Torres*, 523 U.S. at 226-27; *Jones*, 526 U.S. at 232-39.

64. *Id.* at 251 n.11.

65. *Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000) (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).

66. *Id.* at 490.

and recommendations.⁶⁷ Determinate sentencing became the programmatic, and somewhat enormous, law of the land; perhaps fundamental changes seemed too overwhelming an undertaking.

The biggest shocks were still to come. In *Blakely v. Washington*, the Court struck down a provision of the Washington State sentencing guidelines enhancing a defendant's sentence based on the judge-found fact that the defendant's criminal kidnapping involved "deliberate cruelty."⁶⁸ In a decision which echoed the concerns of Justice Stevens in *Watts*, *Blakely* stated that "[w]hen a judge inflicts punishment that the jury's verdict does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his authority."⁶⁹ Although the Court stated that it expressed no opinion on the Federal Sentencing Guidelines,⁷⁰ the *Blakely* Court cast grave doubt on the vim of determinate sentencing legislation nationwide. Following the *Blakely* decision, federal district and circuit courts viewed the continuing vitality of the Guidelines with some skepticism and, according to a report of the U.S. Sentencing Commission, "no longer uniformly applied the sentencing guidelines."⁷¹

The other shoe dropped soon thereafter. Although the Court's audience anticipated the expansion of *Blakely* with the grant of expedited review in *United States v. Booker*⁷² and *United States v. Fanfan*,⁷³ they were unprepared for the Court's choice of remedy. Arguably, the holding in *Blakely* foreshadowed a larger role for juries in sentencing procedures by ensuring that all facts capable of enhancing a defendant's final sentence were, in fact, proven beyond a reasonable doubt.⁷⁴ The *Booker* Court even observed that Sixth Amendment jurisprudence "forced the Court to address the question of how the right to jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime."⁷⁵ Yet instead of increasing the role of the jury in determinate sentencing, the piecemeal five-Justice *Booker* majority remedied the constitutional infractions present in the Federal Sentencing Guidelines by invalidating the mandatory nature of the scheme, thereby making it wholly advisory.⁷⁶

D. Current Sentencing Procedure

The current state of determinate sentencing pursuant to the Guidelines is an evolving enigma. Part II will proffer that, in reality, the tide of *Booker's* potential impact has largely been stemmed, perhaps even completely dammed, by the narrow

67. See Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003) (detailing the limited effect *Apprendi* had on a variety of areas in the criminal sentencing process).

68. 542 U.S. 296, 298, 305 (2004).

69. *Id.* at 304 (citation omitted).

70. *Id.* at 304 n.9.

71. UNITED STATES SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 12 (2006), http://www.ussc.gov/booker_report/Booker_Report.pdf.

72. 543 U.S. 220 (2005).

73. 542 U.S. 956 (2004).

74. See Berman, *supra* note 28, 675-76.

75. *Booker*, 543 U.S. at 237.

76. *Id.* at 222.

judicial application of *Booker's* holding. Post-*Booker* jurisprudence has molded a “new” sentencing procedure that has reached some measure of rote consistency. *Booker* instructs that “[t]he district courts, while not bound to apply the Guidelines, must consult those guidelines and take them into account when sentencing.”⁷⁷ Thus, the calculation of the would-be mandatory guideline range is still the first step in any sentencing assessment.⁷⁸ Tellingly, the Fourth Circuit noted that in most post-*Booker* cases, “a district court will calculate, consult, and take into account *the exact same guideline range* that it would have applied under the pre-*Booker* mandatory guidelines regime.”⁷⁹ Indeed, the “guideline range remains the starting point for the sentencing decision. And, if the district court decides to impose a sentence outside that range, it should explain its reasons for doing so.”⁸⁰

The calculation of this “advisory” range remains rife with judicial fact-finding. While holding the Guidelines scheme unconstitutional, *Booker's* remedy nonetheless purported to “maintain[] 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.”⁸¹ The U.S. Sentencing Commission and subsequent circuit case law have interpreted this guidance as validation of judicial fact-finding with regard to a defendant’s relevant conduct.⁸² Indeed, although defendants have protested, arguing that *Booker* required any disputed fact to be submitted to a jury, the circuits have now nearly unanimously held that *Booker* only proscribes judicial fact-finding that increases a defendant’s sentence above

77. *Id.* at 264.

78. See *United States v. Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005) (“District courts remain statutorily obliged to calculate guidelines ranges in the same manner as before *Booker* and to find facts relevant to sentencing by a preponderance of the evidence”); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) (noting that ordinarily, the sentencing judge must determine the applicable guidelines range in the same manner as before *Booker*; this process includes finding all facts relevant to sentencing using a preponderance of the evidence standard); *United States v. Stone*, 432 F.3d 651, 655 (6th Cir. 2005) (“District courts . . . must, therefore, calculate the Guideline range as they would have done prior to *Booker*”); *United States v. Rodriguez-Alvarez*, 425 F.3d 1041, 1046 (7th Cir. 2005) (“Sentencing courts must continue to calculate the applicable guidelines range even though the guidelines are now advisory.”).

79. *United States v. White*, 405 F.3d 208, 219 (4th Cir. 2005) (citing *Booker*, 543 U.S. at 263-64).

80. *Id.* (internal citations omitted).

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

82. UNITED STATES SENTENCING COMMISSION, *supra* note 71, at 21 n.150 (citing the Guidelines Manual, §1B1.3 (2005) (enumerating the variety of determinations that are still within the province of a sentencing court)). Specifically, the Commission observes that the Guidelines provide that the defendant’s offense level shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense; (2) solely with respect to offenses of a character for which USSG §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction; (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and (4) any other information specified in the applicable guideline.

Id.

the statutory maximum.⁸³ In a recent case, the Sixth Circuit succinctly stated: “*Booker* did not eliminate judicial fact-finding. Instead, the remedial majority gave district courts the option, after calculating the Guideline range, to sentence a defendant outside the resulting Guideline range.”⁸⁴

II.

Bearing the foregoing characterization in mind, Part II will examine the changed aspects of sentencing as exemplified by the Sixth Circuit. Although the court candidly acknowledged that “[a]chieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow[.]”⁸⁵ the Sixth Circuit has proved to be at the forefront of *Booker* jurisprudence,⁸⁶ and its disposition of *Booker* issues provides insight into the larger direction of the judiciary. Through the specific examples of judicial fact-finding in the calculation of the Guidelines, the uniform approval of “shadow” sentences, the “rebuttable presumption of reasonableness” within Guidelines sentences, and *Booker*’s general effect on sentencing factors, Part II will demonstrate how the realities of post-*Booker* application have dwarfed the potential impact of *Booker* and the promise of increased judicial discretion.

A. Judicial Fact-Finding in Guidelines’ Calculations

Shortly after the issuance of *Booker*, the Sixth Circuit issued a flurry of cases attempting to distill its application to judicial fact-finding at sentencing. In one of its earliest cases, *United States v. Oliver*,⁸⁷ the circuit held that the district court erroneously imposed a sentence exceeding the maximum Guidelines’ range “based upon judge-found fact” and the pre-*Booker* sentencing Guidelines.⁸⁸ Although the defendant in *Oliver* was sentenced pursuant to the mandatory Guidelines, the spirit of *Oliver* did not seem constricted to stake its holding on this narrower point, stating: “A sentencing error that leads to a violation of the Sixth Amendment by imposing a more severe sentence than is supported by the jury verdict ‘would diminish the integrity and public reputation of the judicial system [and] also would diminish the fairness of the

83. See, e.g., *United States v. Yeje-Cabrera*, 430 F.3d 1, 17 (1st Cir. 2005); *United States v. Vaughn*, 430 F.3d 518, 521 (2d Cir. 2005); *United States v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006); *United States v. Sander*, 178 F.App’x 221, 223 (4th Cir. 2006); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *United States v. Coffee*, 434 F.3d 887, 898 (6th Cir. 2006); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); *United States v. Pirani*, 406 F.3d 543, 551 n.4 (8th Cir. 2005) (en banc); *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005); *United States v. Kelly*, 159 F.App’x 864, 867-68 (10th Cir. 2005); *United States v. Thomas*, 446 F.3d 1348, 1355 (11th Cir. 2006); *United States v. Coles*, 403 F.3d 764, 769 (D.C. Cir. 2005).

84. *Coffee*, 434 F.3d at 898.

85. *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006).

86. See *supra* note 23 and accompanying text. See also *As the Sixth Circuit Booker World Turns*, Appellate Law & Practice Blog, (Feb. 17, 2005), http://appellate.typepad.com/appellate/2005/02/as_the_sixth_ci.html#more/.

87. 397 F.3d 369 (6th Cir. 2005).

88. *Id.* at 378 (“Given this extension of the length of *Oliver*’s sentence beyond that supported by the facts determined by the jury, we must conclude that the district court’s sentencing determination violated the Sixth Amendment.”).

criminal sentencing system.”⁸⁹

Although the spirit of *Oliver* seemingly intimated the circuit’s complete disapproval of judge-found facts in post-*Booker* sentencing, subsequent cases narrowed *Oliver*’s sentiments significantly. The Sixth Circuit quickly adopted an expansive notion of what comprised “facts admitted by the defendant.”⁹⁰ At the outset, the court held that facts stipulated in plea agreements comprised admissions by defendants.⁹¹ The court then concluded that facts included in the Pre-Sentence Report (“PSR”), and not objected to by the defendant, constituted admitted facts for sentencing purposes.⁹²

The propriety of independent judicial fact-finding, however, remained in doubt. Initially, in *United States v. Davis*, the Sixth Circuit condemned post-*Booker* judge-found facts by holding that “the district court did exactly what the Supreme Court found to be a violation of the Sixth Amendment in *Booker*: the district court engaged in independent fact-finding which enhanced Defendant’s sentence beyond the facts established by the jury verdict or admitted by Defendant.”⁹³ The tide quickly turned after the issuance of *United States v. Davidson*,⁹⁴ wherein the Sixth Circuit more directly addressed whether sentencing courts may independently find facts to enhance a defendant’s sentence pursuant to the Guidelines.

In *Davidson*, two defendants appealed their convictions on the basis of guilty pleas to the attempted manufacture of narcotics and possession of a stolen vehicle.⁹⁵ The defendants specifically challenged the district court’s imposition of a firearm enhancement to lengthen their sentence based on facts that were neither admitted by the defendants, nor found by the jury.⁹⁶ At the outset of its analysis, the *Davidson* court acknowledged that “*absent the judicial findings that Mrs. Davidson possessed a firearm in connection with the attempt to manufacture methamphetamine... Mrs. Davidson’s sentencing range would have been substantially lower.*”⁹⁷ Although the court correspondingly recognized *Booker*’s express prohibition against the imposition of

89. *Id.* at 380 (quoting *United States v. Bostic*, 371 F.3d 865, 877 (6th Cir. 2004)). For other early Sixth Circuit interpretations of *Booker*, see *United States v. Smith*, 404 F.3d 1019, 1023-24 (6th Cir. 2005). See also *United States v. Merkosky*, 135 F.App’x 828, 836-37 (6th Cir. 2005).

90. *United States v. Murdock*, 398 F.3d 491, 501 (6th Cir. 2005).

91. See *id.*

92. See, e.g., *United States v. Adkins*, 429 F.3d 631, 633 (6th Cir. 2005) (holding that when defendant explicitly declines to object to PSR, conduct is deemed admitted for sentencing purposes); *United States v. Roper*, 266 F.3d 526, 532 (6th Cir. 2001) (holding defendant’s withdrawal of objection and stipulation to drug quantity in PSR provided requisite factual basis for enhanced sentence); *United States v. Pruitt*, 156 F.3d 638, 648 (6th Cir. 1998) (holding defendant’s statement that he had no objections to the PSR constitutes an express admission of the amount and type of drugs attributed to the defendant in the report); *United States v. Loggins*, 136 F.App’x 789, 793 (6th Cir. 2005) (“Because the district court did not base the Defendant’s sentence on any fact other than that which the Defendant admitted here (by not objecting to the presentence report), the Defendant’s sentence did not violate the Sixth Amendment.”); *United States v. Clements*, 142 F.App’x 223, 228-229 (6th Cir. 2005) (citing *United States v. Stafford*, 258 F.3d 465, 476 (6th Cir. 2001)) (holding that defendant’s withdrawal of his objection to drug quantities in PSR operated as an admission); *United States v. Harris*, 132 F.App’x 46, 49 (6th Cir. 2005) (holding defendant was deemed to have admitted that his crime involved three firearms where he failed to object to inclusion of this fact in PSR).

93. *United States v. Davis*, 397 F.3d 340, 350 (6th Cir. 2005). Note, however, the language of the concurring opinion, rhetoric that ultimately became the prevailing law governing the propriety of judicial fact-finding. See *supra* note 20 and accompanying text.

94. 409 F.3d 304 (6th Cir. 2005).

95. *Id.*

96. *Id.* at 309.

97. *Id.* (emphasis added).

sentences based on such unconstitutional judicial fact-finding, it nonetheless went on to review the propriety of the facts found by the district court to support its utilization of the firearm enhancement.⁹⁸ In doing so, the court quizzically stated that, “for purposes of determining the Guidelines *recommendation*, we continue to accept a district court’s factual finding that a defendant possessed a firearm during a drug crime unless it is clearly erroneous.”⁹⁹ Thus, the court concluded, for purposes of determining a “non-mandatory Guidelines recommendation,” it would not be error for the district court to impose a guideline-specified “Firearm Enhancement” to defendants’ sentences on remand.¹⁰⁰

In keeping with the rationale of *Davidson*, the Sixth Circuit now routinely approves of judicial fact-finding in sentencing; indeed, district courts “must... calculate the Guideline range as they would have done prior to *Booker*.”¹⁰¹ Sentencing courts may still consider reliable hearsay in calculating the advisory Guidelines sentence.¹⁰² Likewise, sentencing courts may consider uncharged or acquitted conduct in fashioning the defendant’s appropriate Guidelines range, so long as the resulting sentence does not exceed the statutory maximum sentence.¹⁰³ Thus, to the extent that *Booker* impacted independent judicial fact-finding at sentencing, it did so only inasmuch as to require the sentencing court to acknowledge that the Guidelines are now advisory, not mandatory.

B. Shadow Sentences

In discerning what factors sufficiently reflected the sentencing court’s awareness of the “advisory” status of the Guidelines, the Sixth Circuit quickly approved the constitutionality of so-called “shadow” sentences—preventative tactic employed by district courts in the months following *Blakely* and leading up to *Booker*. As a general rule, the Sixth Circuit vacated sentences imposed pursuant to a sentencing court’s belief that the Guidelines provided a mandatory sentencing scheme.¹⁰⁴ A handful of crafty and forward-thinking pre-*Booker* sentencing courts, however, issued two sentences: one sentence if the Guidelines were upheld as constitutional and another “shadow” sentence in case the Supreme Court found the Guidelines unconstitutional.

In *United States v. Christopher*, the Sixth Circuit considered the propriety of issuing these alternative “shadow” sentences.¹⁰⁵ In *Christopher*, the district court first adopted the pre-sentence report’s offense level and loss calculations, and then issued two identical sentences—one treating the Guidelines as a mandatory sentencing scheme

98. *Id.* at 310.

99. *Davidson*, 409 F.3d at 310 (emphasis added) (citing *United States v. Solorio*, 337 F.3d 580, 599 (6th Cir. 2003)).

100. *Id.* at 312-13.

101. *Coffee*, 434 F.3d at 898; cf. *United States v. Williams*, 411 F.3d 675, 678 (6th Cir. 2005).

102. *United States v. Katzopoulos*, 437 F.3d 569, 574-75 (6th Cir. 2006) (holding that the admission of reliable hearsay at sentencing did not violate defendant’s Sixth Amendment rights).

103. See *United States v. Vaught*, 133 F. App’x 229, 233 (6th Cir. 2005) (“The United States need not charge and convict the defendant with the ‘other’ offense; it need only prove the facts supporting the greater charge by a preponderance of the evidence.”); *United States v. Hopson*, No. 05-3253, 2006 WL 1913414, at *1 n.3 (6th Cir. June 11, 2006) (unpublished).

104. *Oliver*, 397 F.3d at 378; cf. *United States v. Barnett*, 398 F.3d 516, 526-30 (6th Cir. 2005); *Loggins*, 136 F.App’x at 793 (6th Cir. 2005).

105. *United States v. Christopher*, 415 F.3d 590, 592 (6th Cir. 2005).

and the other applying § 3553(a) as the governing statute.¹⁰⁶ Affirming the practice, the Sixth Circuit concluded “that when a district court imposes alternative, identical sentences, one under a regime in which Guidelines enhancements are not mandatory, the harmlessness of any *Booker* error is established.”¹⁰⁷

This blanket acceptance of a district court’s alternative sentencing declaration epitomizes the Sixth Circuit’s desire for a “quick-fix” to the problems created by *Booker*. Although, as discussed below, specific standards facilitate the reviewing court’s determination of whether a defendant’s sentence is “reasonable,” condoning the use of “shadow” sentences improperly invites that court to accept sentences devoid of any analysis from the sentencing court.¹⁰⁸

C. Reasonableness Review

The Sixth Circuit has acceded in a recent opinion that post-*Booker*, “we, along with the rest of the federal appellate system, have struggled to define the meaning of reasonableness review for sentencing purposes.”¹⁰⁹ Pursuant to *Booker*’s instruction, the court concluded that, “when a defendant challenges a district court’s sentencing determination, [it is] instructed to determine ‘whether [the] sentence is unreasonable.’”¹¹⁰ Accordingly, the circuit has separated reasonableness challenges into two arguments: (1) procedural unreasonableness (i.e. the failure of a court to adequately consider the sentencing factors enumerated by § 3553(a)); and (2) the unreasonableness of the sentence imposed (i.e. the district court placed undue weight on one particular factor, which resulted in an unreasonable sentence).¹¹¹

Title 18 U.S.C. § 3553 governs both forms of reasonableness review.¹¹² Pursuant to § 3553(a), a sentencing court must consider:

- (1) “the nature and circumstances of the offense and the history and characteristics of the defendant;”
- (2) 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; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the appropriate advisory guideline range;
- (5) any other pertinent policy statement issued by the Sentencing Commission;
- (6) “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and”
- (7) “the need to provide restitution to any victims of the

106. *Id.* at 592-93.

107. *Id.* at 593 (citing *United States v. Strbac*, 129 F.App’x 235, 237 (6th Cir. 2005)). *Accord, e.g.*, *United States v. Hill*, 411 F.3d 425, 426 (3d Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 482 (7th Cir. 2005); *United States v. Thompson*, 403 F.3d 533, 535 (8th Cir. 2005); *United States v. Serrano-Dominguez*, 406 F.3d 1221, 1223 (10th Cir. 2005); *United States v. Anderson*, 124 F.App’x 211, 212 (4th Cir. 2005).

108. *See generally* *United States v. Wilson*, 438 F.3d 672, 675 (6th Cir. 2006); *United States v. Cheney*, 183 F.App’x 516, 516-17 (6th Cir. 2006); *United States v. Johnson*, 184 F.App’x 498, 501-02 (6th Cir. 2006).

109. *United States v. Vonner*, 452 F.3d 560, 566 (6th Cir. 2006).

110. *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005) (quoting *United States v. Booker*, 543 U.S. 220, 261 (2005)) (third alteration in original), *cert. denied*, – U.S. –, 126 S.Ct. 1110 (2006).

111. *See* *United States v. McBride*, 434 F.3d 470, 476 n.3 (6th Cir. 2006).

112. *See* 18 U.S.C. § 3553(a) (2000).

offense.”¹¹³

A sentencing court is charged with the careful consideration of the aforementioned factors to ultimately produce “a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the provision].”¹¹⁴

In two early post-*Booker* cases, *United States v. Webb* and *United States v. Jackson*, the Sixth Circuit attempted to establish the parameters of reasonableness review pursuant to the advisory Guidelines.¹¹⁵ Both cases emphasized the comprehensive nature of the § 3553(a) factors; the *Webb* court specifically stated:

[W]e read *Booker* as instructing appellate courts in determining reasonableness to consider not only the length of the sentence but also the factors evaluated and the procedures employed by the district court in reaching its sentencing determination. Thus, we may conclude that a sentence is unreasonable when the district judge fails to ‘consider’ the applicable Guidelines range or neglects to ‘consider’ the other factors listed in 18 U.S.C. § 3553(a), and instead simply selects what the judge deems an appropriate sentence without such required consideration.¹¹⁶

The circuit was, however, quick to emphasize that although a district court’s discussion of specific § 3553(a) factors facilitates appellate review, “[the Sixth Circuit] has never required the ‘ritual incantation’ of the factors to affirm a sentence.”¹¹⁷ Instead, the circuit reviews challenges for procedural unreasonableness on a case-by-case basis,¹¹⁸ during which it must be capable of engaging “in a meaningful reasonableness review of federal criminal sentences in accordance with *Booker*.”¹¹⁹

Although § 3553 lists several factors, the factor that undoubtedly still carries the most weight is the advisory Guidelines range.¹²⁰ Indeed, in *United States v. Williams*,¹²¹ the circuit “join[ed] several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness.”¹²²

113. *Vonner*, 452 F.3d at 565 (quoting 18 U.S.C. § 3553(a) (2000)).

114. 18 U.S.C. § 3553(a).

115. *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005); *United States v. Jackson*, 408 F.3d 301, 305 (6th Cir. 2005).

116. *Webb*, 403 F.3d at 383; see *Jackson*, 408 F.3d at 305 (noting that a mere listing of factors by a sentencing court is insufficient; “an appellate court must still have the articulation of the reasons the district court reached the sentence ultimately imposed, as required by 18 U.S.C. § 3553(c)”). Interestingly, the district court in *Jackson* departed *downward* from the recommended Guidelines range. In vacating defendant’s sentence, the Sixth Circuit concluded that the district court did not sufficiently articulate reasons to justify a downward departure from the Guidelines. *Id.* at 304-05.

117. *United States v. Johnson*, 403 F.3d 813, 816 (6th Cir. 2005) (quoting *United States v. Washington*, 147 F.3d 490, 490 (6th Cir. 1998)); accord, e.g., *United States v. Kirby*, 418 F.3d 621, 626 (6th Cir. 2005) (“The court need not recite these factors but must articulate its reasoning in deciding to impose a sentence in order to allow for reasonable appellate review.”).

118. See *United States v. Foreman*, 436 F.3d 638, 643-44 (6th Cir. 2006).

119. *Jackson*, 408 F.3d at 305.

120. See *supra* note 18 and accompanying text. After the Sixth Circuit’s *Williams* decision, however, four circuits declined to adopt a presumption of reasonableness. See *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324, 331-32 (3d Cir. 2006); *United States v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006).

121. 436 F.3d 706 (6th Cir. 2006).

122. *Id.* at 708. (“Although the Sentencing Guidelines are not mandatory, sentences within the prescribed range are presumptively reasonable.”) *Id.* at 708 n.1 (citing *United States v. Gonzalez*, 134 F. App’x 595, 598

This, according to *Williams*, did not obviate the duty of a sentencing court to consider all of the relevant § 3553(a) factors, although, again, a “ritual incantation” of the factors remained unnecessary.¹²³ The circuit proceeded to clarify *Williams* by subsequently stating in *United States v. Foreman* that:

Williams does not mean that a sentence outside of the Guidelines range—either higher or lower—is presumptively unreasonable. It is not. *Williams* does not mean that a Guidelines sentence will be found reasonable in the absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors.¹²⁴

Although the *Foreman* court approved of the presumption of reasonableness afforded to Guidelines sentences, it also emphasized the importance of a district court’s analysis of the § 3553(a) factors alongside meaningful appellate review, insisting that the presumption was not “an excuse for an appellate court to abdicate any semblance of meaningful review.”¹²⁵

In *United States v. Richardson*, the Sixth Circuit continued the expansion of *Williams*.¹²⁶ Reiterating that a sentence within the appropriate advisory Guideline range should be credited with a presumption of reasonableness, the court stated nonetheless that:

We emphasize the obligation of the district court in each case to communicate clearly its rationale for imposing the specific sentence. Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant’s argument and that the judge explained the basis for rejecting it. This assures not only that the defendant can understand the basis for the particular sentence but also that the reviewing court can intelligently determine whether the specific sentence is indeed reasonable.¹²⁷

In *United States v. Vonner*, the Sixth Circuit restated the procedural principles of *Williams* cloaked in even broader language.¹²⁸ There, the court reviewed a sentence where:

[t]he only proof in the record of the district court’s consideration is the district court’s statement that “[w]ith respect to the sentence in this case, the Court has considered

(3d Cir. 2005)); *see* *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) (“If the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines.”); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (“The best way to express the new balance, in our view, is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness.”); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005) (utilizing presumption of reasonableness).

123. *Williams*, 436 F.3d at 708-09.

124. *Foreman*, 436 F.3d at 644.

125. *Id.*

126. *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006).

127. *Id.* at 554; *see* *United States v. Morris*, 448 F.3d 929, 932 (6th Cir. 2006) (“This rebuttable presumption does not relieve the district court of the obligation to consider other relevant statutory factors or sufficiently articulate its reasoning so as to permit reasonable appellate review.”).

128. *Vonner*, 452 F.3d at 567-69.

the nature and circumstances of the offense, the history and characteristics of the defendant, the advisory Guideline range, as well as the other factors listed in the 18 United States 3553(a).”¹²⁹

The circuit found the district court’s perfunctory analysis “unreasonable” and therefore admonished: “This type of offhanded dismissal of a defendant’s claims provides mere lip service to the district court’s responsibility to carefully weigh all the facts and provide a defendant with a well-reasoned, well-thought-out sentencing decision.”¹³⁰ In short, it concluded, when a defendant has raised a specific argument or consideration to be considered under the § 3553(a) factors, the sentencing court must proffer an “adequate explanation” for its acceptance or rejection of those arguments.¹³¹

D. The Diminished Effect

This litany of Sixth Circuit cases illustrates several points. At a minimum, the Sixth Circuit has attempted to bolster the continued reliance upon the Guidelines’ calculation with firm rhetoric, arguably establishing a measure of precedent and assuring more consistent expectations of the standard of review for both defendants and sentencing courts. And, although *Booker* and *Blakely* emphasized the constitutional problem with construing the Guidelines as a mandatory sentencing system, the aforementioned reactions by sentencing courts reflect that the Guidelines continue to prevent those courts from balancing determinate and indeterminate sentencing considerations.

As a *first step*, a sentencing court must still calculate the Guidelines precisely as before, thereby engaging in substantial judicial fact-finding. If a pre-*Booker* sentencing court was savvy enough to alternatively recommend an identical-to-the-Guidelines shadow sentence, that sentence is readily affirmed. Additionally, *any* sentence within the Guidelines range is afforded a presumption of reasonableness. Despite the Sixth Circuit’s rhetorical efforts to imbue this presumption with requiring evidence of discretionary language, the effect remains the same: the federal sentencing system remains primarily a determinate scheme buttressed by heavy presumptions. This is evident in post-*Booker* statistics. According to the U.S. Sentencing Commission’s post-*Booker* report, “only one circuit court has held a properly calculated guideline sentence to be unreasonable,”¹³² and “[n]o circuit court has upheld a below-range sentence granted on the basis of either a prohibited factor or the defendant’s cooperation without a government motion having been filed.”¹³³

Put simply, the judicial response to *Booker* has slowed any movement toward a more balanced determinate/ indeterminate sentencing system and has instead redirected sentencing courts to rely on the applicable advisory Guidelines’ range. Although notable commentaries have approved of continuing to afford the advisory Guidelines’

129. *Id.* at 568.

130. *Id.* (citing *McBride*, 434 F.3d at 476 n.3).

131. *Id.* at 569.

132. UNITED STATES SENTENCING COMMISSION, *supra* note 71, at 35 (citing *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006)).

133. *Id.*

range a substantial amount of weight in sentencing determinations,¹³⁴ even those commentaries have lamented the inherent danger in such presumptive weight: the abdication of the exercise of meaningful independent judgment in favor of a pre-determined calculation.¹³⁵

With this conundrum in mind, Part III of this paper provides an overview of Maine's criminal sentencing scheme both before and after *Booker* via the example of the well-publicized case, *State v. Schofield*.¹³⁶

III.

Like the federal system, Maine's pre-*Blakely/Booker* sentencing procedure presented a dilemma identical in almost every material respect to that presented by the Guidelines. Indeed, before the pronouncement of the *Blakely* and *Booker* decisions, Maine's sentencing scheme frequently obligated sentencing judges to determine, by a preponderance of the evidence, whether a defendant's conduct was sufficiently heinous to merit an enhanced sentence. That is, however, the *only* similarity between the two sentencing systems. As detailed below, Maine's response to the Supreme Court's landmark decisions reflects a common sense approach that carefully balances several statutorily enumerated sentencing goals while simultaneously affording much-needed discretion to sentencing judges. In doing so, Maine appropriately moved toward a more balanced determinate/ indeterminate scheme which, unlike the current federal approach, serves to adequately individualize each defendant's sentence.

A. Maine's Statutory Sentencing Framework

In 1976, Maine adopted its Criminal Code and thereby eliminated indeterminate sentences by establishing a three-part procedure for sentencing criminal defendants.¹³⁷ Specifically, the three-part sentencing procedure first required a court to set the basic term of imprisonment "by considering the particular nature and seriousness of the offense as committed by the offender."¹³⁸ Secondly, a sentencing court had to "determine the maximum period of imprisonment to be imposed by considering all other relevant sentencing factors, both aggravating and mitigating, appropriate to that case."¹³⁹ "Mitigating factors may include those that demonstrate a low potential of reoffending, and aggravating factors may include those that demonstrate a high probability of reoffending."¹⁴⁰ During this second step, "the court [had to] apply its discretion to determine the degree of mitigation called for by the circumstances of the

134. For one such judicial commentary, see *United States v. Buchanan*, 449 F.3d 731, 735-41 (6th Cir. 2006) (Sutton, J., concurring).

135. *See id.* at 740. ("If I have one anxiety about the presumption, it is the risk that it will cast a discouraging shadow on trial judges who otherwise would grant variances in exercising their independent judgment.").

136. 2005 ME 82, ¶ 16, 895 A.2d 927.

137. *State v. Lewis*, 590 A.2d 149, 150 (Me. 1991).

138. ME. REV. STAT. ANN. tit. 17-A, § 1252-C(1) (2004); *see State v. Hewey*, 622 A.2d 1151, 1154 (Me. 1993) (noting the trial court must consider, at step one, "the particular nature and seriousness of the offense without regard to the circumstances of the offender" (quoting *State v. Weir*, 600 A.2d 1105, 1106 (Me. 1991))).

139. ME. REV. STAT. ANN. tit. 17-A, § 1252-C(2) (2004).

140. *State v. Gray*, 2006 ME 29, ¶ 13, 893 A.2d 611, 616 (citing *Hewey*, 622 A.2d at 1154).

offender and the degree of aggravation indicated by specific factors demonstrating a high risk of re-offending.”¹⁴¹ Doing so enabled the court to “appropriately individualize each sentence.”¹⁴²

Finally, at step three, a sentencing court analyzed whether any portion “of the maximum period of imprisonment should be suspended and, if a suspension order is to be entered, determine the appropriate period of probation to accompany that suspension.”¹⁴³ At this third step, “the court [could] suspend a portion of the period of *maximum* incarceration when, for example, the court determines that society will better be protected by affording a period of supervised probation of an offender.”¹⁴⁴ Not unlike its federal counterpart,¹⁴⁵ any Maine sentence was additionally guided by the following statutorily enumerated “purposes”:

1. To prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety;
2. To encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served;
3. To minimize correctional experiences which serve to promote further criminality;
4. To give fair warning of the nature of the sentences that may be imposed on the conviction of a crime;
5. To eliminate inequalities in sentences that are unrelated to legitimate criminological goals;
6. To encourage differentiation among offenders with a view to a just individualization of sentences;
7. To promote the development of correctional programs which elicit the cooperation of convicted persons; and
8. To permit sentences that do not diminish the gravity of offenses, with reference to the factors, among others, of:

141. *State v. Weir*, 600 A.2d 1105, 1106 (Me. 1991).

142. *Id.*

143. ME. REV. STAT. ANN. tit. 17-A, § 1252-C(3) (2004).

144. *Hewey*, 622 A.2d at 1155.

145. 18 U.S.C. § 3553(a)(2) (2000).

- A. The age of the victim; and
- B. The selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation of that person or of the owner or occupant of that property.¹⁴⁶

The Maine Criminal Code also established corresponding maximum periods of imprisonment for each class of crime. Specifically, Maine's Criminal Code set the maximum term of imprisonment for serious crimes, other than murder,¹⁴⁷ and categorized them into Class A, Class B, Class C, Class D, and Class E.¹⁴⁸ Years later, in 1988, a divided Judiciary Committee proposed that the punishment solely for Class A crimes be doubled.¹⁴⁹ The Committee, however, specified that their proposal would not apply to *all* Class A crimes; instead, the amendment would apply only to those defendants receiving close-to-maximum sentences for “the most heinous and violent crimes that are committed against a person.”¹⁵⁰ Following the bill's approval, enacted at 17-A M.R.S.A. § 1252(2)(A), the maximum sentence for Class A crimes was increased from twenty to forty years.¹⁵¹

B. Heading toward a Booker problem: The promulgation of Maine's two-tier sentencing for “the most heinous and violent crimes”

Following the promulgation of section 1252(2)(A), the Maine Supreme Judicial Court (“SJC”) concluded, in *State v. Lewis*,¹⁵² that “the [Legislature's] intent was to make available two discrete ranges of sentences for Class A crimes.”¹⁵³ Thus, ordinarily, a defendant who committed a Class A crime would receive a sentence below twenty years.¹⁵⁴ Consistent with the language embodied by the 1988 sentencing amendment, however, a finding by a preponderance of the evidence that the defendant's crime constituted one of “the most heinous and violent crimes committed against a

146. ME. REV. STAT. ANN. tit. 17-A, § 1151 (2004).

147. Murder is a class of crime unto itself, carrying a minimum sentence of twenty-five years and a maximum sentence of life in prison. ME. REV. STAT. ANN. tit. 17-A, § 1251 (2004).

148. ME. REV. STAT. ANN. tit. 17-A, § 1252 (2004). Under the current law, a defendant who commits a “Class A” crime may be sentenced to a term of imprisonment “not to exceed 30 years.” § 1252(2)(A). Correspondingly, “[i]n the case of a Class B crime, the court shall set a definite period not to exceed 10 years.” § 1252(2)(B). A “Class C” crime is punishable by a definite period of imprisonment “not to exceed 5 years.” § 1252(2)(C). A “Class D” crime is punishable by a period of “less than one year” while a “Class E” crime is punishable by a period of imprisonment “not to exceed 6 months.” §§ 1252(2)(D)-(E). As discussed more fully below, this Paper focuses on section 1252(2)(A) as written before the legislature's most recent 2004 amendment.

149. *Lewis*, 590 A.2d at 151.

150. *Id.* (quoting Com. Amend. A to L.D. 2312, No. H-720 (113th Legis. 1988)).

151. 1987 Me. Laws 1834 (codified at ME. REV. STAT. ANN. tit. 17-A, §§ 1252(2)(A), 1252-B (Supp. 1990)).

152. 590 A.2d 149 (Me. 1991).

153. *Lewis*, 590 A.2d at 151. Following the issuance of *Lewis*, the Legislature amended section 1252(2)(A) to incorporate the two-tier approach. 1995 Me. Laws 956-57, § 1 (effective Sept. 29, 1995).

154. *Lewis*, 590 A.2d at 151.

person” would enable the sentencing court to “in its discretion consider imposing a basic sentence within the expanded range of twenty to forty years.”¹⁵⁵ Significantly, a trial court was tasked with determining whether a defendant’s crime merited an upper-tier sentence at the first step of the sentencing process (i.e. when setting the basic term of imprisonment.)¹⁵⁶ As a result, “[c]ircumstances of the offender, or other circumstances unrelated to the nature and seriousness of the offense, [could not] elevate the *maximum* period of incarceration beyond twenty years when *the crime itself* is not within the extended range of Class A crimes.”¹⁵⁷ Indeed, as noted, only at step two was a court permitted to consider the factors peculiar to the offending defendant.¹⁵⁸

With that structure in mind, sentencing judges were frequently required to make findings at step one to determine in which “zone” a Class A offender should be sentenced.¹⁵⁹ To determine whether a particular defendant’s conduct was sufficiently “heinous” to merit an upper-tier penalty, a sentencing court was instructed to compare the commission of that defendant’s act to “all of the possible means of committing the offenses on a scale reflecting degrees of seriousness....”¹⁶⁰ If “defendant’s conduct would cause his offenses to rank high on that scale[,]” then a sentence in the upper quadrant of the sentencing range was appropriate.¹⁶¹ A sentencing court was invited to consider facts outside the record and,¹⁶² most importantly, whether the commission of

155. *Id.*; State v. Schofield, 2005 ME 82, ¶ 16, 895 A.2d 927, 932 (noting utility of the preponderance of the evidence standard in sentencing).

156. State v. Roberts, 641 A.2d 177, 179 n.3 (Me. 1994) (“Inherent in determining the basic period of incarceration for a Class A offense is establishing whether the statutory maximum sentence that can be imposed for that offense is twenty years or the extended range of forty years, and fixing the basic period of incarceration within that limit.”) (citing State v. Shackelford, 634 A.2d 1292, 1295 (Me. 1993)); see State v. Cobb, 2006 ME 43, ¶ 11 n.7, 895 A.2d 972, 976 (observing that the trial court should “have determined whether it would be considering a sentence in the upper tier *before* beginning the three-part *Hewey* analysis”).

157. State v. Hawkins, 633 A.2d 78, 79 (Me. 1993) (emphasis added).

158. State v. Hewey, 622 A.2d 1151, 1154 (Me. 1993).

159. *E.g.*, State v. Carr, 1998 ME 237, ¶ 5, 719 A.2d 531, 533 (“For Class A crimes, the trial court must also decide whether the basic period of incarceration is within two discrete zones—the extended forty-year range, pursuant to 17-A M.R.S.A. § 1252(2)(A), or the usual twenty-year range.”) (citing *Lewis*, 590 A.2d at 151).

160. State v. Hollowell, 577 A.2d 778, 781 (Me. 1990); see State v. Corbett, 618 A.2d 222, 223 (Me. 1992) (“In evaluating the nature and seriousness of the offense we place the criminal conduct on a continuum for each type of offense ‘to determine which act justifies the imposition of the most extreme punishment.’” (quoting State v. St. Pierre, 584 A.2d 618, 621 (Me. 1990))); State v. Lilley, 624 A.2d 935, 937 (Me. 1993) (“A comparison of this case with other recent cases supports our conclusion that defendant’s sentence resulted from an error in principle and that the suspended portion of defendant’s final sentence is disproportionate to sentences for comparable offenders.”). Given the high standard of appellate review for sentences, the importance of the sentencing court’s determination cannot be overstated. See State v. Weir, 600 A.2d 1105, 1106 (Me. 1991) (“[W]e accord the sentencing court great deference in weighing these [aggravating and mitigating] factors in order that it may appropriately individualize each sentence.”); accord State v. Tapley, 609 A.2d 722, 723 (Me. 1992) (observing that the sentencing court receives “great deference” in weighing the sentencing factors).

161. *Hollowell*, 577 A.2d at 781. Compare State v. Kehling, 601 A.2d 620, 624 (Me. 1991) (“The nature of the crime committed by defendant Kehling in setting an apartment house afire in the early morning hours was sufficiently heinous and violent to justify the imposition of a basic sentence at the top of the upper range recognized by *Lewis*.”), with State v. Corbett, 618 A.2d 222, 224-25 (Me. 1992) (reversing defendant’s elevated sentence because although she sold one and one-half grams of cocaine near school grounds, “the sales occurred after school hours and minors were not involved”).

162. State v. Gallant, 600 A.2d 830, 832 (Me. 1991) (“In making its sentencing decision, the court is not limited to facts found at trial.”) (citing State v. Dumont, 507 A.2d 164, 166 (Me. 1986)). Indeed, as the *Gallant* court indicated, “[t]he facts contained in a presentence report may properly influence the court’s sentence if the defendant has the opportunity to challenge the report.” *Id.*

defendant's crime was accompanied by extreme violence or serious physical injury.¹⁶³ Notably, however, a non-violent crime could qualify for an extended sentence so long as it was sufficiently heinous.¹⁶⁴ The defendant, who possesses a litany of prior convictions, could likewise receive an enhanced sentence.¹⁶⁵

With the foregoing principles in mind, the SJC has affirmed sentences in the upper-tier imposed upon defendants who (1) savagely attacked the victim with a knife and subsequently left the victim to die in the woods;¹⁶⁶ (2) for two years, used alcohol, drugs, gifts, money, and pornography to lure and groom thirteen and fourteen-year-old boys into sexual relationships;¹⁶⁷ and (3) possessed a criminal history including killing a prison inmate, injuring a prison guard, and stabbing five people during a prison riot.¹⁶⁸ Conversely, the court viewed close-to maximum sentences to be inappropriate for (1) sexual assaults "in cases that involve neither a weapon, nor a heightened degree of violence, injury, torture, or depravity[;]"¹⁶⁹ (2) arson committed without any apparent motive,¹⁷⁰ and (3) drug sales.¹⁷¹

163. *State v. Clark*, 591 A.2d 462, 464-65 (Me. 1991) ("The upper quadrant of the sentencing range is reserved for offenses that are accomplished, for example, with extreme violence and accompanied by serious physical injury.").

164. *State v. Sweet*, 2000 ME 14, ¶ 18, 745 A.2d 368, 373-74. In rejecting the theory that only violent crimes could qualify for an upper-tier sentence, the court stated as follows:

We next address the defendants' contention that the court engaged in a misapplication of principle when it found that the sentences met the criteria for the upper tier. Primarily, *Sweet* and Poulin argue that their conduct leading to the gross sexual assault charges was not violent, and therefore enhanced sentences were inappropriate. They are correct that their conduct did not include forced, precipitously violent, or injury-producing conduct. Rather, their method of obtaining victims had as its center point coercion, not physical violence. Stripped to its essence, their goal was to create willing and eager sexual partners of children. By their actions, they exposed their victims to an environment of sex, alcohol, and pornography. They undertook these actions with boys whose ages placed them at the cusp of sexual development. Their actions in this regard may well have created greater long-term damage to their victims than a violent one-time assault could have done. In addition, the young victims were subjected to anal penetration, attempted penetration, and a variety of other physically intrusive sexual activities. We conclude, as did the sentencing court, that such conduct is sufficiently heinous that the absence of precipitous violence does not preclude a sentence in the upper tier.

Id. (footnote omitted) (emphasis in original).

165. *State v. Cobb*, 2006 ME 43, ¶ 22, 895 A.2d 972, 978 ("[T]he elevation into the upper tier does not require submission to a jury if it is based solely on prior convictions."). This Paper notes the inclusion of this category solely for the sake of completeness. Given that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), excepts "the fact of a prior conviction" from the general rule that sentencing-enhancing facts must be found by a jury and proved beyond a reasonable doubt, the discussion below will not revisit the impact of prior convictions on a defendant's sentence. *E.g.*, *United States v. Poole*, 407 F.3d 767, 777 (6th Cir. 2005) ("*Booker's* holding, that the Sixth Amendment bars mandatory enhancements based on judicial fact-finding, does not apply to the 'fact of a prior conviction.'").

166. *State v. Cooper*, 617 A.2d 1011, 1016 (Me. 1992) (noting that the trial court, in enhancing defendant's sentence, emphasized "the savage and brutal nature of the attack and the fact that Cooper left the victim to die in the woods where his open wounds became infested with maggots").

167. *Sweet*, 2000 ME 14, at ¶ 18, 745 A.2d at 373-74.

168. *See supra* note 163 and accompanying text (noting Paper will not discuss impact of a defendant's criminal history on his or her sentence).

169. *Clark*, 591 A.2d at 464.

170. *State v. Cloutier*, 646 A.2d 358, 361 (Me. 1994), *overruled on other grounds by State v. Berube*, 1997 ME 165, ¶ 19, 698 A.2d 509, 515 (Me. 1997):

None of the arsons committed in this case, even taking into account that those committed on June 14 were successive fires that affected the ability of the fire departments to combat each separate fire, greatly increasing the risk of death and destruction for each fire set, were committed against a person so as to justify basic periods of incarceration in excess of twenty years.

171. *E.g.*, *State v. Babbitt*, 658 A.2d 651, 654 (Me. 1995) ("The drug sales involved in this case, although

C. Confronting Booker: The impact of State v. Schofield

Maine's upper/ lower tier sentencing scheme was dramatically reformed in *State v. Schofield*.¹⁷² The court's opinion in *Schofield*, which followed the Supreme Court's decisions in *Blakely* and *Booker*, addressed the constitutionality of a sentencing judge's statutory power to determine, pursuant to section 1252(2)(A), whether a particular defendant's conduct was sufficiently "heinous" to merit an upper-tier penalty.¹⁷³ In addition to being a watershed case from a legal perspective, the unique facts giving rise to Sally Schofield's criminal prosecution, recounted below, sparked an unprecedented amount of media coverage.¹⁷⁴

Defendant Sally Schofield worked as a caseworker in Maine's Department of Human Services ("DHS") from the early 1990s until November of 2000.¹⁷⁵ As Schofield discharged her responsibilities as a DHS caseworker in 1996, Christy Marr gave birth to her troubled daughter, Logan.¹⁷⁶ Christy, then a teenaged mother, immediately had difficulty raising Logan and, as a result, Christy moved in with her mother.¹⁷⁷ Her mother, however, had doubts about Christy's maturity and overall ability to effectively parent Logan.¹⁷⁸ Christy's mother called DHS to report her concern; DHS records reflect her initial concern that "Christy can't or won't put Logan's needs before her own. [Christy's mother] said that Christy screams and hollers at the baby all the time and handles her extremely roughly."¹⁷⁹ Those concerns culminated in the removal, by DHS, of then two-and-a-half-year-old Logan into state custody from Christy while she was pregnant with her second child.¹⁸⁰

After the birth of her new baby girl, Bailey, Christy temporarily revamped her life

serious offenses, cannot be classified as crimes of violence."); *State v. Hawkins*, 633 A.2d 78, 80 (Me. 1993) ("The drug sales involved here, although serious, cannot be classified as crimes of violence by any rational interpretation of legislative intent.").

172. 2005 ME 82, 895 A.2d 927 (Me. 2005).

173. *Id.*

174. The articles covering the complex factual and procedural history of this case are far too many to mention. For a representative sample, see Virginia Heffernan, *Good Intentions in Maine Leave a Girl Dead and a Mother in Prison*, N.Y. TIMES, Jan. 30, 2003, at E5; Meadow Rue Merrill, *Foster Child's Death Raises Questions in Maine*, BOSTON GLOBE, Apr. 29, 2001, at B1; Associated Press, *Foster Child's Death in Maine Prompts Scrutiny of System by State Lawmakers*, ST. LOUIS POST-DISPATCH, Apr. 29, 2001, at A16. The public's fascination with the Schofield case culminated with a PBS special dedicated to examining the life of the victim, Logan Marr, and the bureaucracy that led to her death. *Frontline: Failure to Protect* (PBS television broadcast Jan. 30, 2003). Schofield's name remains in the public eye given her decision to again challenge her sentence. *E.g.*, Gregory D. Kesich, *Justices to Gauge Child-Killer's Sentence*, PORTLAND PRESS HERALD, June 3, 2006, at B1; Gary Remal, *Court to Review Schofield Case Again*, KENNEBEC JOURNAL, May 25, 2006, <http://kennebecjournal.mainetoday.com/news/local/2768281.shtml>.

175. *Schofield*, 2005 ME 82, ¶ 38, 95 A.2d at 929. The unique facts of *State v. Schofield* prompted award-winning journalist Terrilyn Simpson to exhaustively document the events leading up to, and including, Schofield's trial. Using an independent newspaper to tell Schofield's story, Simpson dedicated twenty-eight pages to chronicling the tragic events preceding Logan Marr's death. Terrilyn Simpson, *Logan's Truth*, COMMON SENSE INDEP., Oct. 2002, available at <http://www.asmainegoes.com/loganstruth.htm#Down> [hereinafter *Logan's Truth*]. Given the majority opinion's decision to include few facts giving rise to the Schofield case, this Paper periodically references Simpson's work and the PBS Frontline special for background details.

176. *Frontline: Failure to Protect – The Taking of Logan Marr*, <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/marr/> (last visited July 14, 2006) [hereinafter *Frontline*].

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

and persuaded DHS of her fitness as a mother to care for both Logan and Bailey.¹⁸¹ Her ability to care for Logan and Bailey, however, did not last; both children were removed from Christy's care because, according to DHS, Christy became romantically involved with an accused sex offender who allegedly hit Christy in front of Logan.¹⁸² DHS, therefore, again removed Logan into state custody, this time with Bailey, and placed the pair in the care of their second foster mother.¹⁸³ Almost immediately after her second placement in foster care, Logan began acting out by throwing angry temper-tantrums, which often included physical outrages.¹⁸⁴

Commensurate with the foster mother's struggles with Logan's behavior, Schofield, who was still employed by DHS, began to consider adopting a female child of her own.¹⁸⁵ Although Schofield had two boys of her own, and DHS discouraged its caseworkers from adopting children from within the system, Schofield nonetheless obtained custody over Logan and Bailey in September of 2000.¹⁸⁶ Only a few short months after her placement with Schofield, Logan began exhibiting intensely verbal and physical outrages similar to those she displayed with her previous foster mother.¹⁸⁷ As Logan's outbursts further intensified,¹⁸⁸ Schofield began invoking "progressively longer time-out periods, which often involved covering Logan with a blanket, or lying on top of her while bargaining with Logan for the release of one limb at a time."¹⁸⁹

The struggle between Schofield and Logan ended with Logan's death on January 31, 2001, as a snowstorm raged outside.¹⁹⁰ At home on that afternoon, Logan's behavior intensified to such an extent that Schofield took Logan down the basement stairs where Schofield placed five-year-old Logan in a high chair behind a blanket curtain facing a concrete wall.¹⁹¹ Schofield then returned upstairs ostensibly to cook dinner.¹⁹² A subsequent investigation of what soon became a crime scene revealed that Schofield did not simply leave Logan in her high chair; instead, as the sentencing court recounted:

[Schofield] secured Logan to the high chair by wrapping layers of duct tape around Logan's torso and behind the back of the chair to prevent her from getting out. To silence her screams she wrapped more duct tape under her chin, over her head and across her mouth. Having already violated the [Department] rules of discipline by

181. *Frontline*, *supra* note 173.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Frontline*, *supra* note 173. Schofield ultimately quit her job at DHS in January 2001. *Id.*

187. *Id.*

188. *See id.* PBS articulately described this period of Schofield's relationship with Logan as follows:

As Logan's behavior deteriorated, Sally found herself at a loss. Logan would rage out of control, screaming, kicking, and thrashing so violently that Sally was afraid she would hurt herself. Suddenly, all the confidence Sally had accumulated as a parent and a DHS caseworker seemed to vanish. "I was supposed to be trained," she told FRONTLINE. "I was supposed to be educated. How come I couldn't help her? How come I didn't know what to do?"

Frontline, *supra* note 173.

189. *Schofield*, 2005 ME 82, ¶ 3, 895 A.2d at 929.

190. *Logan's Truth*, *supra* note 172, at 20.

191. *Id.* at 22.

192. *Id.*

physical confinement, Ms. Schofield then left Logan to struggle against her bonds in isolation.¹⁹³

All told, Schofield wrapped forty-two feet of duct tape over Logan's mouth and upper lip.¹⁹⁴ Shortly after Logan's screams went silent, Schofield went to the basement to check on Logan, after which she called 9-1-1.¹⁹⁵ Although Logan was rushed to the hospital, she was pronounced dead soon thereafter.¹⁹⁶

That night, the police interviewed Schofield, who claimed that Logan was not restrained in her high chair.¹⁹⁷ Detectives, however, uncovered evidence to the contrary when searching Schofield's home; indeed, they recovered the duct tape which Schofield removed prior to the arrival of medical personnel.¹⁹⁸ Forensic tests then confirmed that "three layers of tape had been placed over Logan's mouth and upper lip, as evidenced by a bloody froth from Logan's congested lungs, with a DNA match to Logan, and tiny mustache hairs directly above the bloody stain..."¹⁹⁹ Although, after police confronted Schofield with this new evidence, she initially claimed that Logan tangled herself in the duct tape,²⁰⁰ her story ultimately crumbled and she was indicted for depraved indifference murder in violation of 17-A M.R.S.A. § 201(1)(B), and manslaughter in violation of 17-A M.R.S.A. § 203(1)(A).²⁰¹

Although, during Schofield's jury-waived trial held in June of 2002, the trial court granted her motion for acquittal on the charge of depraved indifference murder, the court ultimately found Schofield guilty of manslaughter.²⁰² At her subsequent sentencing hearing, the court imposed upon Schofield a sentence in excess of twenty years pursuant to section 1252(2)(A) because, *the court found*, Schofield's crime was sufficiently "heinous" to merit an upper-tier sentence. The court stated:

It became a test of wills between Logan and Sally, and Sally Schofield was determined to win out. She couldn't accept the fact that a five-year-old Logan might get the best of her. And yet despite all of her training and all of her experience and

193. *Schofield*, 2005 ME 82, ¶ 4, 895 A.2d at 929.

194. *Logan's Truth*, *supra* note 172, at 22. Terrilyn Simpson described the events that followed the authorities' arrival at Schofield's home as follows:

Wearing a pink jersey and a light-colored pair of overalls, Logan's face was pale. Barefooted, one of her toes was bleeding, suggesting she'd struck it against the concrete wall she'd been left facing from the high chair although [investigator] Mills had no way of knowing that.

When a firefighter arrived as part of the rescue response, Mills carried Logan upstairs. She'd wet herself. Mills said the child vomited over his shoulder; the coroner later explained the incident as "postmortem regurgitation" and explained that "when people die," they also frequently lose bowel and bladder control.

Id. at 23.

195. *Id.* at 22. Schofield's teenage son testified at trial that his mother actually made two trips up the basement stairs; the first, prosecutors believed, was to get a tool to cut the duct tape and the second, as discussed above, was to call 9-1-1. *Id.* at 22-23. Prosecutors further theorized that Schofield was not simply trying to save Logan, but instead was "desperate" to remove the duct tape before calling 9-1-1. *Id.* at 23.

196. *Frontline*, *supra* note 173.

197. *Id.*

198. *Id.*

199. *Logan's Truth*, *supra* note 172, at 22.

200. *Frontline*, *supra* note 173.

201. *Schofield*, 2005 ME 82, ¶ 5, 895 A.2d at 929.

202. *Id.*

knowledge of children in foster care and her awareness of the rules and regulations, she acted recklessly when she restrained Logan in the basement to fight her bonds in solitude and silence.

The situation developed over time, and the conduct leading to the actual death, however, did not happen in a momentary lapse. The defendant's conduct in restraining Logan recklessly led to her death. At any time during the process of restraining her she could've closed the door instead of putting the gag around her. She could've turned up the radio if she wanted to drown out the sounds of Logan making noise and yelling. Putting her in restraints was against the rules and regulations of the placement. But even if she had done that, by placing the duct tape around the head and as was disclosed-described as clamping her mouth shut, Logan had no chance.

This case is most serious, and the Court believes that the base sentence in this case falls in the 20 to 25-year range. With the enhancement called for in the death of a child under the age of six, the Court fixes the base sentence at 28 years.²⁰³

In the next steps of the sentencing process, the court declined to make any adjustment to the base sentence and thereafter (1) suspended eight years of the twenty-eight-year sentence,²⁰⁴ and (2) ordered Schofield to serve six years of probation following the completion of her prison term.²⁰⁵ The SJC granted Schofield leave to appeal her sentence.²⁰⁶

On appeal, the SJC considered, in pertinent part, whether an upper-tier sentence determination must be made by a jury. After reviewing both the *Blakely* and *Booker* decisions, the court held that section 1252(2)(A) could not be constitutionally applied to Schofield's sentencing. In the critical portion of its analysis, the court stated as follows:

As we have already noted, section 1252(2)(A) required a finding that Schofield's crime was "among the most heinous crimes committed against a person" before a sentence exceeding twenty years could be imposed. That fact was not pleaded in Schofield's indictment as an element of the offense of manslaughter, was not admitted by Schofield, and was not determined beyond a reasonable doubt by the fact-finder. For these reasons, section 1252(2)(A) cannot be constitutionally applied without affording the defendant an opportunity to have the fact-finder of her choice, judge or jury, determine whether, beyond a reasonable doubt, the crime was among the most heinous offenses committed against a person.²⁰⁷

203. *Id.* at ¶ 7, 895 A.2d at 930.

204. Maine does not have a parole system. Instead, sentences of imprisonment can be ordered to be fully served in incarceration, can be wholly suspended with probation, or can be split, with an unsuspended portion of the sentence to be served in incarceration, followed by a period of probation. ME. REV. STAT. ANN. tit. 17-A, § 1152(2) (2004).

205. *Schofield*, 2005 ME 82, ¶ 8, 895 A.2d at 930.

206. *Id.* at ¶ 10, 895 A.2d at 930.

207. *Id.* at ¶ 21, 895 A.2d at 933.

In thereafter approving of the use of “jury sentencing” to determine any fact necessary to enhance Schofield’s sentence, the court vacated her original sentence and remanded with instructions for the sentencing court to provide Schofield with “the opportunity for a sentencing trial before the fact-finder of her choice (i.e., judge or jury).”²⁰⁸ The court concluded by observing that, on remand, Schofield’s sentence may properly be enhanced *only if* her chosen fact-finder determines beyond a reasonable doubt that Schofield’s offense is among the most heinous committed against a person.²⁰⁹

D. Sentencing after Schofield

Although the court’s holding in *Schofield* undoubtedly affected defendants whose sentences were enhanced pursuant to the two-tier system,²¹⁰ its impact was significantly limited by the legislature’s preemptive amendment to section 1252(2)(A) in 2004.²¹¹ At that time, the legislature revised the language of section 1252(2)(A) to read that, “[i]n the case of a Class A crime, the court shall set a definite period not to exceed 30 years.”²¹² “This legislation indicated in its statement of fact that it was designed to eliminate a ‘constitutional cloud’ created by *Apprendi* by eliminating what it characterized as the two-tier system and replacing it with ‘a single 0- to 30-year range.’”²¹³ Quite evidently ahead of its time, that amendment enabled the legislature to cut off the potential flood of defendants impacted by *Schofield* by wholly eliminating the two “zones” of sentencing and replacing it with a 0-30 year range.

Thus, were Schofield sentenced today, the sentencing court would be confined simply to the 0-30 range provided by revised section 1252(2)(A). To reach an appropriate sentence for Schofield, the court would continue to follow the three-step *Hewey* analysis. Accordingly, the court would (1) set a basic term of imprisonment; (2) consider aggravating and mitigating circumstances; and (3) determine whether any

208. *Id.* at ¶ 40, 895 A.2d at 938. Notably, the court subsequently altered a portion of this paragraph. In this paragraph, the court initially outlined a jury instruction, which the trial judge was directed to read to the jury in the event that Schofield, in fact, elected a jury to determine the facts necessary to impose an enhanced sentence. *Id.* In *State v. Averill*, 2005 ME 83, 887 A.2d 519, however, the court modified a portion of the jury instruction. That modification is not relevant to this Paper.

209. *Schofield*, 2005 ME 82, ¶ 41, 895 A.2d at 938.

210. *E.g.*, *State v. Averill*, 2005 ME 83, 887 A.2d 519. At the outset, it bears noting that the same citation to *Averill* reveals two separate opinions, the most recent of which merely revises a portion of *Schofield*. See *supra* note 205, and accompanying text. The substantive *Averill* opinion reflects that the sentencing court determined that the manner in which defendant committed the sexual assault for which he was found guilty comprised one of the most heinous ways such an act could occur. *Id.* at ¶ 4, 887 A.2d at 521. The sentencing court therefore concluded that an upper-tier sentence was appropriate. *Id.* After appealing his sentence, *Averill* contended that “he was entitled to have the issue of heinousness presented to the jury and was denied his Sixth Amendment rights when a sentence in excess of twenty years was imposed without his being given the opportunity to have a jury make that determination.” *Id.* at ¶ 7, 887 A.2d at 521. Citing *Schofield*, the SJC agreed with *Averill*’s arguments and, accordingly, remanded for resentencing. *Id.* at ¶ 9, 887 A.2d at 521-22. In doing so, the court noted that although *Averill* could constitutionally be sentenced without further fact-finding to a sentence of twenty-years or less, “[a] sentencing trial is required if the State recommends, and/or the court is inclined to impose, a sentence in excess of twenty years based on heinousness.” *Id.* at ¶ 10, 887 A.2d at 522; *cf.* *State v. Miller*, 2005 ME 84, 875 A.2d 694 (holding no constitutional problem arose from judicial fact-finding in discretionary sentencing under distinct statutory provision).

211. 2003 Me. Legis. Serv. 2083, § 10 (West) (codified at ME. REV. STAT. ANN tit. 17-A § 1252(2)(A) (2004)).

212. ME. REV. STAT. ANN tit. 17-A, § 1252(2)(A) (2004).

213. *Schofield*, 2005 ME 82, ¶ 9 n.4, 895 A.2d at 930 n.4 (quoting L.D. 1844 Statement of Fact (121st Legis. 2004)).

portion of the sentence should be suspended. By providing such a procedure, Maine has sought to protect the legislature's interest in reducing sentencing disparity at step one (i.e., by mandating a specific sentencing range for a particular class of crime), while simultaneously ensuring that each defendant will receive the benefit of genuine judicial discretion at step two.

IV.

Notwithstanding its complexity, the Maine sentencing system provides what is, in essence, a three-step checklist for the sentencing court to follow. Built into that list is, of course, a variety of statutorily enumerated sentencing purposes. Accordingly, the sentencing judge who closely adheres to each step appropriately individualizes each defendant's punishment while simultaneously seeking to achieve uniformity in sentencing. The ultimate sentence therefore reflects a balance of determinate and indeterminate components. Importantly, in Maine, uniformity does not trump individualization; so long as the requisite "checklist" is adhered to, sentencing courts in Maine retain substantial discretion to tailor the sentence to the individual defendant. As a result, a properly imposed sentence in Maine is met with extraordinary deference, thereby conserving judicial resources.

Admittedly, the Federal Sentencing Guidelines were initially drafted to accomplish nearly identical goals. Indeed, at the outset of their promulgation, the Guidelines were designed to provide district courts with at least some limited discretion. Under the guise of seeking to avoid inequality in sentencing, however, the federal appellate judiciary's application and interpretation of the Guidelines has slowly divested whatever remaining discretion sentencing courts possessed when imposing a sentence pursuant to the Guidelines. Indeed, after *Booker*, sentencing courts are tacitly charged with adhering to the recommended Guidelines range or risk reversal. The result, as documented in Part II by reference to opinions authored by the Sixth Circuit, reflects a gradual shift toward a sentencing regime dedicated almost exclusively to determinate sentencing.

The merits of a determinate, as opposed to an indeterminate, sentencing system, have long been debated.²¹⁴ In sum, those who advocate in favor of determinate sentencing contend that it provides equality in punishment while simultaneously limiting the unpredictable application of judicial discretion.²¹⁵ Conversely, proponents of indeterminate sentencing highlight that equitable punishments arise not from across-the-board mandatory sentences, but rather from the uniform application of certain sentencing principles.²¹⁶ Although patently divergent, the foregoing arguments reflect one glaring similarity: regardless of whether one favors indeterminate or determinate sentencing, both camps seek to avoid an unwarranted disparity in sentencing. This Article has not sought to advocate on behalf of either indeterminate or determinate sentencing but, instead, has assumed that the ultimate goal of any sentencing scheme is

214. E.g., Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 LAW & INEQ. 1, 8 (1993) (outlining the general arguments in favor of, and against, determinate and indeterminate sentencing).

215. See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 37 (1995).

216. E.g., Daniel Weiss, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1583 n.79 (2005).

to avoid inequitable sentencing.

To that end, a comprehensive examination of the history of federal sentencing, as well as an examination of its state counterparts, is needed. As discussed in Part II, the Sixth Circuit's various approaches to sentencing—the presumption of reasonableness, shadow sentences, and judicial fact-finding for enhancements—serve merely to unconstitutionally streamline federal sentencing procedures by distracting federal judges from their duty to impose individualized sentences upon every defendant who enters their courtroom. To worsen matters, whatever discretion remains is currently being absorbed by the growing trend of appellate courts to reverse a sentencing court's decision to grant to defendants a downward departure.²¹⁷ Thus, although the current state of federal sentencing procedures outwardly purports to possess indeterminate and determinate components, the practical reality of federal sentencing reflects an unwavering addiction to the narrow ranges proscribed by the Guidelines.

In contrast, this Article has proffered that the combination of the Maine legislature's revision of the two-tiered approach previously endorsed by section 1252(2)(A) alongside the Sixth Amendment boundary imposed by the *Schofield* opinion serve as an interesting window through which to view a proposed response to the Supreme Court's *Blakely* and *Booker* decisions. Notably, that response differs starkly from that endorsed by the Sixth Circuit. Indeed, unlike the Sixth Circuit's tacit return to pre-*Booker* sentencing procedures, Maine's mixed determinate/ indeterminate sentencing system marks clear constitutional boundaries for sentencing judges while simultaneously ensuring the individualization of each defendant's sentence.

Further to blame is the federal judiciary's current approach to reviewing sentences. As noted, a circuit court typically reviews post-*Booker* sentences for "reasonableness."²¹⁸ The "reasonableness" standard of review is at best confusing and, at worst, an invitation to consider a panoply of additional, often pre-*Booker*,²¹⁹ corresponding standards of review.²²⁰ Indeed, lying beneath the topical reasonableness standard exist, for example, (1) a de novo approach to reviewing asserted errors in the application of the Guidelines;²²¹ (2) a clearly erroneous standard applicable to appellate

217. *E.g.*, *United States v. Brown*, 453 F.3d 1024, 1027 (8th Cir. 2006) (vacating below-guideline sentence); *United States v. Martin*, 455 F.3d 1227, 1242 (11th Cir. 2006) (same). The recent numbers published by the Sentencing Commission are nothing short of staggering. Indeed, only in 5.2% of cases are defendants receiving a downward departure from their applicable advisory guidelines range. U.S. SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT: CASES SENTENCED SUBSEQUENT TO *U.S. v. BOOKER* 16 (2006), available at http://www.ussc.gov/Blakely/PostBooker_060106.pdf.

218. *See supra* text accompanying note 109.

219. *See United States v. Robinson*, 433 F.3d 31, 35 (1st Cir. 2005) (observing that despite *Booker*'s reasonableness standard, the court continues to review the district court's interpretations of the legal meaning of the sentencing guidelines de novo and its factual findings for clear error); *United States v. Villegas*, 404 F.3d 355, 359 (5th Cir. 2005) (holding that de novo standard still applies to determining whether the district court correctly interpreted and applied the sentencing guidelines); *United States v. Arnaout*, 431 F.3d 994, 998 (7th Cir. 2005) ("[W]e continue to review the district court's factual findings at sentencing for clear error and the application of those facts to the Sentencing Guidelines *de novo*.").

220. Confusingly, at least one court views the reasonableness inquiry to involve asking whether the district court abused its discretion in announcing sentence. *See United States v. Pizano*, 403 F.3d 991, 995 (8th Cir. 2005) ("To make the reasonableness determination, we ask whether the district court abused its discretion.").

221. *United States v. Montanez*, 442 F.3d 485, 488 (6th Cir. 2006) ("We review legal conclusions regarding the application of Guideline provisions *de novo*." (citing *United States v. Foreman*, 436 F.3d 638, 640 (6th Cir. 2006)).

challenges to a sentencing court's imposition of an enhancement;²²² and (3) a clearly erroneous standard applicable to a defendant's acceptance of responsibility.²²³

Grounded in the notion that the sentencing court is better able to evaluate the circumstances of each particular defendant,²²⁴ the Maine Supreme Judicial Court employs a far more workable, albeit complex, and deferential two-step standard when reviewing sentences.²²⁵ Perhaps the best example of Maine's deferential approach exists at the outset; indeed, a three-justice panel of the Supreme Judicial Court must first grant a defendant leave to review his or her sentence before the entire court will consider any asserted error in sentencing.²²⁶ Assuming discretionary leave is granted,²²⁷ the court reviews the lower court's determination of the defendant's basic period of incarceration for "misapplication of principle."²²⁸ In doing so, the court accords "great deference" to (1) "the weight and effect given by the court to those factors peculiar to a particular offender in its determination of the offender's maximum period of incarceration;" and (2) "the court's determination whether to suspend any portion of that maximum period in arriving at the final sentence imposed on the offender by the court."²²⁹ Accordingly, as the court stated in *State v. Hewey*:

Because of the two different standards applicable in our review of the sentencing process, the desirability of a clear articulation by the trial court of its compliance with the three-step procedure becomes apparent. This articulation will aid us not only in distinguishing and applying the appropriate standard of appellate review, – i.e., the misapplication of principle standard to a trial court's determination of the basic period of incarceration and a standard of considerable deference to its determinations of the maximum period of incarceration and the final sentence—but it will also facilitate a greater degree of uniformity in the sentencing process.²³⁰

222. See *supra* text accompanying notes 94-102, the *Davidson* opinion appears particularly problematic in light of *Booker*. Simply stated, the *Davidson* decision tacitly approves of the imposition of post-*Booker* sentencing enhancements based neither on facts proven to a jury beyond a reasonable doubt, nor admitted to by the defendant. The utilization of the *Davidson* court's "non-mandatory Guideline recommendation" plainly departs from Supreme Court precedent. Indeed, regardless of the name assigned to describe the *Davidson* decision's analysis, the result creates a tenuous *Booker* loophole allowing the backdoor utilization of unconstitutional judicial fact-finding to support sentencing enhancements.

223. *United States v. Williams*, 894 F.2d 208, 213 (6th Cir. 1990) ("We review the district court's determination of a defendant's acceptance of responsibility under a clearly erroneous standard." (citing *United States v. Wilson*, 878 F.2d 921, 923 (6th Cir. 1989))). *United States v. Lunsford*, No. 95-1507, 1996 U.S. App. LEXIS 6552, at *4 (6th Cir. Feb. 15, 1996) ("Whether a defendant has accepted responsibility for criminal conduct is a question of fact, and the district court's determination on this issue will be disturbed only if clearly erroneous.").

224. *State v. Sweet*, 2000 ME 14, ¶ 15, 745 A.2d 368, 372-73 (noting that "the sentencing court is in a better position to review aggravating and mitigating factors").

225. See *id.* ¶¶ 10, 13, 745 A.2d at 372 (acknowledging that the sentencing process is complex and that the sentencing court is tasked with attempting to accomplish several goals).

226. ME. REV. STAT. ANN. tit. 15, § 2152 (2005).

227. See generally Daniel E. Wathen, *Judges on Judging: Making Law the Old Fashioned Way—One Case at a Time*, 52 OHIO ST. L.J. 611, 619 (1991) (discussing the limited number of sentencing appeals granted in Maine).

228. *State v. Hollowell*, 577 A.2d 778, 781 (Me. 1990) ("It is not enough that the members of this court might have passed a different sentence, rather it is only when a sentence appears to err in principle that we will alter it.").

229. *State v. Hewey*, 622 A.2d 1151, 1155 (Me. 1993) (emphasis in original).

230. *Id.* (emphasis in original).

Then, after determining that each individual step in the *Hewey* process was correctly applied, the court reviews the sentence in its entirety for an abuse of discretion.²³¹

No such process exists at the federal level. Consequently, the unfortunate likely result of the federal judiciary's erosion of the *Booker* ideals seems an unavoidable return to the pre-*Booker* discontent recounted at the outset of this Article. Before that happens, we should reconsider the role of Guidelines in federal sentencing, and the Sentencing Commission would do well to examine the long history of sentencing in this country, as well as evolution of sentencing in its state counterparts. Rather than radically respond to the *Booker* decision by, for example, abolishing the Guidelines *in toto* or, conversely, making them entirely mandatory,²³² we should specifically consider reevaluating the weight to be accorded the Guidelines when sentencing federal defendants. We should correspondingly limit undue reliance on the Guidelines when reviewing the actions of a sentencing court on appeal. The most immediate consequence of such a proposal would, at a minimum, require appellate courts to abandon the "presumption of reasonableness" already coveted by so many circuits. Then, from a long-term perspective, the judiciary should consider gradually moving toward a model not unlike Maine's system. Doing so would, ironically, better suit the original goals as outlined by the Sentencing Commission, better comport with the historical evolution of sentencing in this country and, ultimately, achieve a more reasonable balance between determinate and indeterminate sentencing.

231. *State v. Sweet*, 2000 ME 14, ¶ 22, 745 A.2d 368, 375. Moreover, any appellate review must be guided by (1) the opportunity to provide for the correction of sentences; (2) the need to promote respect for the law; (3) the need to "facilitate the possible rehabilitation of an offender;" and (4) the chance to promote the sentencing court's adherence to applicable sentencing criteria. ME. REV. STAT. ANN. tit. 15, § 2154 (2005).

232. One example is the so-called Sensenbrenner bill. *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004*, H.R. 4547, 108th Cong. (2004). Although the bill is purportedly a measure to promote drug treatment while protecting children, it actually includes sweepingly harsh mandatory minimum sentences for a wide range of drug crimes. For example, the bill as written would, *inter alia*, impose the following penalties: (1) a ten-year mandatory minimum sentence upon a person older than twenty-one who sells *any* quantity of *any* controlled substance to a person younger than eighteen; (2) a life sentence upon individuals twenty-one years or older who are convicted a second time of distributing drugs to a person under eighteen; and (3) an increase of the federal mandatory minimum sentence for the sale of *any* type of controlled substance within one thousand feet of a school, college, public library, drug treatment facility, or private/ public daycare facilities, to five years.