Prosecutors as Punishment Theorists: Seeking Sentencing Justice

Michael A Simons

Available at: https://works.bepress.com/michael_simons/1/
Prosecutors as Punishment Theorists: Seeking Sentencing Justice

Michael A. Simons

Federal criminal law in the last 100 years has seen three distinct sentencing eras. Most surveys of these three sentencing eras have focused on the changing power of the judge: from unfettered discretion before the Sentencing Guidelines, to severely restricted discretion under the mandatory guidelines, to our current system of guided discretion under United States v. Booker. This article, however, focuses on the role of the prosecutor, which has changed dramatically over time. In the era of individualized sentencing, prosecutors typically either abdicated sentencing responsibility or made non-binding recommendations based on individualization principles. There was little reason for prosecutors to become more involved, given the breadth of judicial discretion and the absence of appellate review. During the mandatory guidelines era, prosecutors became much more active at sentencing, advocating for particular guidelines ranges and appealing sentences that departed from those ranges. Our current system of advisory guidelines combines elements of the first two eras. Prosecutors must still compute and advocate for particular guidelines calculations, but now they must also argue – both at sentencing and on appeal – that the sentences they recommend are “reasonable.” Put differently, prosecutors now must justify the sentences they seek by reference to the traditional principles of punishment.

This article examines prosecutors’ new role as punishment theorists. In particular, the article argues that by forcing prosecutors to justify their sentences, Booker has caused an unintended, but potentially important, shift in prosecutorial engagement with sentencing justice. The article then examines whether this new engagement with sentencing justice can improve other aspects of prosecutorial discretion. In particular, the article argues that the principles of sentencing justice being developed by federal courts in the wake of Booker can inform not just prosecutorial sentencing arguments, but also prosecutorial charging decisions. In the end, the article proposes a solution the persistent challenge of mandatory minimum sentences: prosecutors should use Booker’s “reasonableness” standard in determining whether to file charges that will result in a mandatory sentence above the advisory guidelines range.
Prosecutors as Punishment Theorists: Seeking Sentencing Justice

Michael A. Simons

TABLE OF CONTENTS

PAGE

I. INTRODUCTION ........................................................................................................... 1

II. THE ROOTS OF PROSECUTORIAL DETACHMENT FROM SENTENCING JUSTICE ........................................................................................................... 6
   A. Prosecutorial Discretion, Charging Decisions, and Sentencing Justice .................................................. 6
   B. The Pre-Guidelines Era: Sentencing by the Judiciary .............................................................. 9
   C. The Mandatory Guidelines Era: Sentencing by Commission .................................................. 14

III. MANDATORY SENTENCES: SENTENCING BY PROSECUTORS .............. 26
   A. Mandatory Minimum Sentences ........................................................................... 28
   B. Sentencing Enhancements ................................................................................... 31
   C. Case Studies in Sentencing Enhancements ................................................................ 34
   D. Prosecutorial Discretion, Department of Justice Policy, and the Charging of Sentencing Enhancements ........................................................................ 39

IV. THE ADVISORY GUIDELINES ERA: PROSECUTORS AS PUNISHMENT THEORISTS .................................................................................. 47
   A. The Booker Rollback ........................................................................................................ 48
   B. Seeking “Reasonableness” at Sentencing ........................................................................ 53
   C. Seeking “Reasonableness” in Charging ........................................................................ 57

V. CONCLUSION ............................................................................................................. 62
Prosecutors as Punishment Theorists: Seeking Sentencing Justice

Michael A. Simons

I. INTRODUCTION

It is a truism that prosecutors are called not just to win, not just to zealously represent their clients, but rather to “seek justice.” What this admonition means in practice, however, is notoriously slippery. Most obviously, it means that prosecutors should not convict (or charge) the innocent. It is also quite commonly understood to mean that prosecutors should “play by the rules” and should ensure that defendants are afforded a fair process. More fundamentally, it means that prosecutors should ensure that the power of the state is wielded judiciously. In other words, the prosecutor has an obligation not just to ensure procedural fairness, but also to ensure substantive justice.

These three special prosecutorial obligations are, in many ways, quite different from each other. The obligation to avoid prosecuting the innocent is straightforward and rather easy for prosecutors to understand (if not...
always easy to apply in practice). It is also regulated, albeit indirectly, by jury verdicts and judicial acquittals. Similarly, the obligation to ensure a fair process is based on generally accepted principles – largely embodied in the Constitution – and is heavily regulated by judicial oversight. The obligation to seek substantive justice, however, is not closely regulated. Indeed, it is hardly regulated at all. We call it prosecutorial discretion, and it is the core of the prosecution function, the most important thing prosecutors do.

Notwithstanding the universal acceptance of prosecutors’ obligation to “seek justice,” relatively little attention has been paid to federal prosecutors’ role in ensuring justice at sentencing. To the extent that commentators have examined the relationship between substantive justice and prosecutorial discretion, the focus has usually been on prosecutorial charging discretion: the power that prosecutors have to decide whether a defendant should be charged, which charges should be brought, and whether the defendant should be allowed to plead guilty to lesser charges. On one level, this inattention to sentencing justice is surprising, for what

---

5 See infra notes 15-31 and accompanying text.
6 See David A. Sklansky, Starr, Singleton, and the Prosecutor’s Role, 26 Fordham Urban L.J. 509, 533 (1999) (arguing that while the academy has lavish attention on recent changes to sentencing law, it has largely “ignored” addressing the prosecutor’s role in securing sentencing justice). One area that has received academic attention is prosecutorial decision-making about sentencing discounts for cooperating defendants. See, e.g., Michael A. Simons, Departing Ways: Uniformity, Disparity, and Cooperation in Federal Drug Sentences, 47 VILL. L. REV. 921 (2002); R. Michael Cassidy, Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,” 83 NOTRE DAME L. REV. 635, 653-67 (2006). To the extent that scholars have addressed prosecutorial discretion to control sentencing, it has usually been in the context of evaluating judicial or legislative responses to that discretion. See, e.g., Nancy J. King, Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment, 58 STAN. L. REV. 293, 302 (2005) (calling for judicial oversight of mandatory sentences); Marc L. Miller, Domination & Dissatisfaction: Prosecutors as Sentencers, 56 STAN. L. REV. 1211, 1265 (2004) (calling for legislative elimination of mandatory sentences).
matters most in our criminal justice system – what defendants and victims and society care about – is not the charge, but the sentence. On another level, however, this neglect of the prosecutorial role in sentencing justice is not at all surprising. For most of the past one hundred years, federal prosecutors have exercised very little formal discretion at sentencing. Indeed, for the most part, federal prosecutors – and the academy as well – have viewed sentencing justice as the responsibility of the judicial and legislative branches.\(^8\)

This view of federal prosecutors’ role at sentencing has prevailed under two very different sentencing systems. For most of the Twentieth Century, federal prosecutors operated under an indeterminate sentencing system in which judges had almost unfettered discretion to individualize sentences for particular defendants. Because prosecutors had relatively little authority to affect the sentence, they typically saw their role as simply securing the conviction. Although prosecutors no doubt cared about the sentences that resulted, they were not required to take a position on the justice of the sentence, and they had almost no power to contest a sentence on appeal. Questions of sentencing justice could be left to the judge (and to the parole board).\(^9\)

In 1987, the federal sentencing system changed completely. The indeterminate system that had prevailed for decades was replaced with a determinate system in which judges were constrained by a complex set of Sentencing Guidelines designed to eliminate unwarranted sentencing disparity. Under the Guidelines system, prosecutors played a much more active role at sentencing, proving sentencing facts and arguing Guidelines

---


\(^9\) See infra notes 32-50 and accompanying text.
law. But prosecutors still were not required to concern themselves with the justice of the ultimate sentence. Questions of sentencing justice were left to the Sentencing Commission (and, to a lesser extent, to the judge).  

Superficially, this limiting of the prosecutor’s involvement at sentencing made sense and was consistent with traditional institutional roles: the prosecutor decided the charge, the jury decided guilt or innocence, and the judge decided the sentence. This division of roles, however, had one major exception: mandatory sentences. At the same time it created the Sentencing Guidelines, Congress also began creating a variety of crimes that carried mandatory minimum sentences, typically for offenses involving drugs and guns. Because these mandatory sentences “trump” the Sentencing Guidelines, the charge often determined the sentence. In other words, by charging (or not charging) an offense with a mandatory minimum sentence, the prosecutor effectively became the sentencer. In a system in which sentencing is viewed as a judicial function and in which prosecutors are typically not asked to engage with questions of sentencing justice, this “sentencing by charge” increases the risk of unjust sentences.

In January 2005, the Supreme Court created a third federal sentencing system, one that combines elements of the first two. In United States v. Booker, the Court declared that the Sentencing Guidelines are merely advisory. The Court also declared that sentences should be based not only on the Guidelines but also on the traditional purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation. Finally, the Court established a new appellate review procedure whereby federal appellate courts would determine whether the sentence was “reasonable” given the Guidelines and the principles of punishment. Under this system of advisory guidelines, prosecutors still play the role to which they had become accustomed – proving sentencing facts and arguing Guidelines law to establish the appropriate Guidelines range. But prosecutors now also find themselves in the unfamiliar role of arguing – both at sentencing and on appeal – that a particular sentence is or is not reasonable. In other

---

10 See infra notes 51-107 and accompanying text.
12 See id. at 224 (quoting 18 U.S.C. § 3553(a)).
words, prosecutors must justify the sentences they seek by reference to the traditional purposes of punishment. Indirectly, *Booker* has caused prosecutors to engage at last with questions of justice at sentencing.

This engagement with sentencing justice can also provide a vehicle to address the worst aspects of mandatory minimum sentences. As prosecutors grow more accustomed to their role as punishment theorists with responsibility for justice at sentencing, they can also begin to play that role more actively when making charging decisions. In other words, prosecutors can – and should – use the same principles of punishment that determine sentencing “reasonableness” under *Booker* to determine the “reasonableness” of a charge that carries a mandatory sentence.13

Part II of this article will explore the roots of prosecutorial detachment from sentencing justice, as prosecutors first served as passive bystanders under the pre-Guidelines system of individualized judicial sentencing, and then served as sentencing technicians under the pre-*Booker* mandatory Guidelines. Part II will also explain why this detachment was sensible, at least in theory, because both systems were designed so that responsibility for sentencing justice resided elsewhere – either with the judiciary or with the Sentencing Commission. Part III, however, will examine a situation in which prosecutorial detachment from sentencing justice is not sensible: when prosecutors act as *de facto* sentencing judges by charging crimes with mandatory sentences.

In Part IV, this article will examine the changes wrought by *Booker*’s unintended, but potentially important, shift in prosecutorial engagement with sentencing justice. In particular, the article will examine whether the principles of sentencing justice being developed by federal courts in the wake of *Booker* can inform not just prosecutorial sentencing arguments, but

---

13 There are, of course, more straightforward legislative ways to fix the problem with mandatory sentences, as judges and commentators of all stripes have been arguing for years. See, e.g., Paul G. Cassell, *Too Severe?: A Defense Of The Federal Sentencing Guidelines (And A Critique Of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004); John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J. L. ETHICS & PUB. POL’Y 311 (2004); Ian Weinstein, *Fifteen Years After The Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective And Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003). Congress, however, has repeatedly show itself unwilling to engage in any sentencing reforms that could be viewed as “soft on crime.” *Id.* at 131.
also prosecutorial charging decisions – particularly charging decisions that directly affect the required sentence. In the end, the article will argue that prosecutors should use Booker’s “reasonableness” standard in determining whether to file charges that will result in a sentence above the advisory guidelines range. By directly incorporating an explicit consideration of the principles of punishment into their charging decisions, prosecutors can take an active role in ensuring sentencing justice.

II. THE ROOTS OF PROSECUTORIAL DETACHMENT FROM SENTENCING JUSTICE

A. Prosecutorial Discretion, Charging Decisions, and Sentencing Justice

The two main theories that underlie criminal law and criminal punishment – utilitarianism and retributivism – have been debated by philosophers and theorists for centuries. Nevertheless, in practice, there is widespread agreement about the animating principles of criminal punishment, at least in their most general form. Wrongdoers should be punished (1) because they have culpably inflicted a harm (retribution), (2) so that others will be discouraged from committing future crimes (general deterrence), (3) so that the individual wrongdoer will be discouraged from committing future crimes (specific deterrence), (4) so that the individual wrongdoer will be physically prevented from committing future crimes (incapacitation); and (5) so that the individual wrongdoer can be changed in ways that will reduce future criminal activity (rehabilitation).

14 Complementing these general theories are three additional principles. First, sentences should be uniform, so that similar conduct by similarly situated wrongdoers receives similar punishment. Second, sentences should be proportional, so that more serious wrongdoing is punished more seriously than less serious wrongdoing. Third, sentences should be parsimonious, so that wrongdoers are not punished any more than is necessary or deserved based on the other principles of punishment.

Until recently, federal prosecutors’ engagement with these principles at sentencing was indirect at best. This disengagement with sentencing justice

14 See generally Joshua Dressler, Understanding Criminal Law § 2.03 (3d ed. 1995).
was not an accident. By legislative design, the power to determine the sentence has traditionally resided elsewhere: first with the judge, then with the Sentencing Commission. To understand why, it is necessary to consider the scope of prosecutorial discretion.

Unbridled prosecutorial discretion is one of the defining characteristics of the American criminal justice system, and the core of the prosecutor's power is the charging decision. The prosecutorial charging decision can be summed up in two questions: "Who?" (as in, “Who should be charged?”) and “What?” (as in “What charges should be brought?” or “What charges should the defendant be allowed to plead guilty to?”). Formally, these decisions are almost entirely immune from judicial review. They are, however, informally constrained by various institutional forces.

On the question of “who” should be charged, prosecutors are typically limited in two ways. First, they must rely on law enforcement to identify targets and to gather evidence. Second, they must ultimately answer to the electorate about their decisions to bring (or not to bring) cases. Nevertheless, these constraints generally operate with much less force against federal prosecutors. For one, federal prosecutors are typically less dependent upon law enforcement and can exercise greater control over the

---

15 See KENNETH CULP DAVIS, supra note 7, at 188 (“Viewed in broad perspective, the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers but the one that stands out above all others is the power to prosecute or not to prosecute.”).

16 See Angela J. Davis, supra note 7, at 408 ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion."). For a full (and critical) examination of prosecutorial power and discretion, see ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (Oxford 2007) ("Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official.").

17 See Angela J. Davis, supra note 7, at 408 ("Prosecutors decide whether and how to charge an individual. They decide whether to offer a plea to a lesser charge, set the terms of the plea, and assess whether the conditions have been met.”).

18 See ANGELA J. DAVIS, supra note 16, at 5 (“The most remarkable feature of [prosecutors'] important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable. Prosecutors make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors.”). While it is technically possible for judges to review prosecutorial charging decisions pursuant to a claim of selective or vindictive prosecution, such claims are notoriously difficult to prove. See Melissa L. Jampol, Goodbye To The Defense Of Selective Prosecution, 87 J. CRIM. L. & CRIMINOLOGY 932 (1997).
allocation of investigative resources. Indeed, federal prosecutors are often directly involved in the investigative stage of a case and can make decisions about who should be targeted very early in the process. State prosecutions, on the other hand, are more often responsive, with the prosecutor making decisions only after the police have made an arrest. Moreover, because federal prosecutors’ political accountability runs through the President, they are less directly accountable than their locally elected state counterparts.

“What” to charge is a different decision, but also one left almost entirely to the prosecutor’s discretion. Here again, federal-state differences are important. Most state criminal laws are part of an organized coherent code and the “right” crime for a particular wrongdoer’s conduct is often readily apparent. Federal criminal law, on the other hand, is anything but organized. Indeed, there are thousands of different federal crimes, many of which apply to the same conduct. Thus, a federal prosecutor will typically have an array of possible crimes to choose from in bringing charges against a particular defendant. For example, a defendant who

---

20 See id. at 780.
21 Of course, some state prosecutions involve proactive investigations by prosecutors and some federal prosecutions involve reactive prosecutions following arrests; but, in general, the institutional differences in approach between federal and state prosecutors are pervasive. See William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 HARV. L. REV. 842, 862-63 (2001).
23 Felony charges, of course, require a grand jury finding of probable cause. The grand jury requirement, however, provides few limits on the prosecutor’s charging discussion.
submits a fraudulent claim to the United States might be charged with mail fraud, 26 wire fraud, 27 theft of public money, 28 false claims, 29 false statement, 30 conspiracy, 31 or any combination of the above.

In the absence of the usual institutional, political, and legal forces that constrain charging decisions, the federal criminal justice system has taken a different approach. But instead of constraining the prosecutor’s charging decision, federal law has instead constrained the effect of the prosecutor’s charging decision by making the ultimate sentence not dependent upon the charge selected by the prosecutor. The effect, both in the pre-Guidelines era and in the Guidelines era, was to remove prosecutors from questions of sentencing justice.

B. The Pre-Guidelines Era: Sentencing by the Judiciary

The defining characteristic of sentencing in the pre-Guidelines era was unfettered judicial discretion. 32 In the indeterminate system that prevailed for most of the Twentieth Century, the prosecutorial charging decision set only the broadest parameters for the sentence. Prosecutors had the power to decide which charges to bring, but the charging decision had little direct affect on the ultimate sentence. The sentence was determined by the judge, and the actual amount of time the defendant spent in prison was determined by the parole board.

Most federal crimes – then and now – carry extremely broad sentencing ranges. For example, the statutorily permissible sentence for bribing a
public official is imprisonment for "not more than fifteen years";\(^{33}\) the statutory sentencing range for armed bank robbery is imprisonment for "not more than twenty-five years";\(^{34}\) and the range for kidnapping is imprisonment for "any term of years or for life."\(^{35}\) None of those federal crimes carry a minimum sentence.\(^{36}\) Thus, in the indeterminate sentencing system used in federal courts before 1987, the prosecutor’s charging decision usually determined only the maximum possible sentence.\(^{37}\) The actual sentence imposed was solely within the judge’s discretion,\(^ {38}\) and appellate review was practically nonexistent.\(^ {39}\) Moreover, because most defendants were eligible for parole, the amount of time served on any sentence was actually determined by the Parole Board.

At the heart of this system was the belief that the purpose of criminal punishment was to rehabilitate the defendant. Writing in 1949, the Supreme Court extolled the enlightened philosophy underlying individualized sentences and judicial discretion:

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the


\(^{36}\) Similarly, while the maximum sentences for mail fraud, wire fraud, theft of public money, false statement, false claims, and conspiracy range from 20 years to 5 years, none of the crimes carry a minimum sentence. See 18 U.S.C. §§ 287, 371, 641, 1001, 1341, 1343.

\(^{37}\) Although a few federal criminal statutes provide minimum as well as maximum sentences, few of those statutes predate the Guidelines era. In any event, the resulting range is typically extremely broad. For example, the authorized prison sentence for distributing 500 grams of cocaine ranges from a minimum of five years to a maximum of forty years. See 21 U.S.C. § 841(b)(1)(B).

\(^{38}\) See STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS (1989) (noting that “[i]n a system that has no statutory sentencing mandates other than the requirement of setting a term or fine within the ranges defined, and the judge is free not to mete out a prison term or not to set a fine if he or she so chooses,” because “the legislative framework establishes only weakly felt constraints and gives little direction in determining how to set sentences in specific cases”). See generally MARVIN FRANKEL, CRIMINAL SENTENCE: LAW WITHOUT ORDER (1973) (criticizing the broad discretion given to sentencing judges).

\(^{39}\) See, e.g., United States v. Brenneman, 918 F.2d 745 (8th Cir. 1990) (“Appellate review of pre-Guidelines sentences is very limited. If the sentence imposed is within the applicable statutory limits, the sentence is generally not subject to review on appeal. We review only for manifest or gross abuse of discretion “such that the severity of the sentence ‘shocks the judicial conscience.’” (quoting Castaldi v. United States, 783 F.2d 119, 123 (8th Cir. 1986)).
past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions – even for offenses today deemed trivial. Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences, the ultimate termination of which are sometimes decided by nonjudicial agencies have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.\(^{40}\)

As a result, prosecutors had little legal authority to affect the ultimate sentence.\(^{41}\) Of course, prosecutors could still use their persuasive authority to argue for particular sentences, which they no doubt did on occasion.\(^{42}\)

\(^{40}\) United States v. Williams, 337 U.S. 241 (1949). See also Marvin Frankel, Criminal Sentences: Law Without Order (1973) (noting that “it is fashionable nowadays to say ... that only rehabilitation of the offender can justify confinement”).

\(^{41}\) In their influential study of pre-Guidelines sentencing, Wheeler, Mann, and Sarat concluded that, in most cases, neither the choice of charges nor the number of charges greatly affected the sentencing decision. Wheeler, Mann & Sarat, supra note 38 at 17 (quoting one federal judge who noted that “One must ‘look behind the charging instrument’ to avoid the uneven impact of prosecutorial discretion.”).

\(^{42}\) For an interesting discussion of prosecutorial sentencing advocacy in a high-profile pre-guidelines case, see Stanton Wheeler, Adversarial Biography: Reflections on the Sentencing of Michael Milken, 3 Fed. Sent. Rep. 167 (1990) (describing the government lengthy sentencing memorandum in the “last of the great pre-guidelines sentences”). See also United States v. Hawthorne, 806 F.2d 493 (3d Cir. 1986) (noting district court’s “apparent reliance on the Government's Sentencing Memorandum,” which recommended a four-year sentence). In other pre-Guidelines cases, even without lengthy sentencing memoranda, the prosecution would sometimes recommend a specific sentence, often as part of a negotiated bargain. See, e.g., United States v. Januszewski, 777 F.2d 108, 109 (2d Cir. 1985) (describing a plea agreement in which the prosecution agreed "to make a non-binding sentence recommendation for a sentence 'not to exceed six years'”). Even when made, it is not clear that prosecutorial recommendations had an important effect. In their seminal study of white collar sentencing before the Guidelines, Wheeler, Mann, and Sarat describe almost no role for prosecutorial recommendations in affecting judicial sentencing determinations. See Wheeler, Mann & Sarat, supra note 38 at 27-53 (describing the sources of information used by judges in sentencing white-collar criminals).
But, in many cases, prosecutors took a passive approach to sentencing. Indeed, prosecutors often explicitly bargained away their ability to even try to influence the judge’s sentencing decision. In some cases, the prosecution would agree to limit its role at sentencing to presenting its view of the facts, rather than recommending a specific sentence (or a specific application of the principles of punishment). In other cases, the prosecution would specifically agree to remain silent, explicitly abdicating any responsibility for the sentence imposed.

This willingness to bargain away a role at sentencing is not surprising, because Department of Justice policies affirmative discouraged prosecutors from endeavoring to influence judicial sentencing decisions. For many years, official Department of Justice policy has been that “[s]entencing in Federal criminal cases is primarily the function and responsibility of the court.” Although this policy permits prosecutors to make sentencing recommendations when “warranted by the public interest,” the clear preference is for no recommendation at all.

Without consistent input from prosecutors, judges were left on their own to fashion whatever sentence they thought fit the offense and the offender.

---

43 See, e.g., United States v. Picone, 773 F.2d 224 (8th Cir. 1985) (describing the prosecution’s agreement “not to make any recommendations as to sentencing”); United States v. Corsentino, 685 F.2d 47, 49 (2d Cir. 1982) (prosecution “promised to ‘take no position at sentence’”).

44 See United States v. Harvey, 784 F.2d 330 (8th Cir. 1986) (describing a plea agreement in which the government agreed that it "would not make a recommendation as to sentencing" but "reserved the right to present its version of the facts to the district court"); United States v. Carbone, 739 F.2d 45 (2d Cir. 1984) ("The government promised that it would 'make no recommendation to the sentencing judge ....' but reserved the right to bring out the facts of the case at the sentencing hearing and to correct any factual misstatements by defense counsel.").

45 See, e.g., United States v. Oldham, 787 F.2d 454, 456 (8th Cir. 1986) (noting that the prosecution "promised to stand mute at sentencing"); United States v. Baylin, 696 F.2d 1030, 1035 (3rd Cir. 1982) (plea agreement required prosecution “to remain silent and to make no recommendation ... as to the nature and length of sentence, if any, to be imposed by the Court upon the Defendant, and ... not to oppose, or to take any position with respect to, any request which the Defendant may make for a particular sentence"); United States v. Avery, 621 F.2d 214 (5th Cir.1980) (prosecution promised “to make no recommendation and stand mute” at sentencing).


47 See id. ("The prosecutor should bear in mind the attitude of the court toward sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation.").
In doing so, and consistent with the then-dominant purpose of rehabilitation, judges often focused on those characteristics that made the defendant an individual: criminal history, age, education, employment, family background, family responsibilities, charitable works, health, history of substance abuse, behavior at trial, assistance to the authorities, remorse, and any other factor that the judge considered relevant.48

By the 1970s, this system of individualized sentencing had come under increasing attack. Sentencing reformers argued that judges, in exercising their unfettered discretion, were imposing indefensibly inconsistent sentences. One of the most forceful critics of pre-Guidelines sentencing was federal Judge Marvin Frankel, whose influential book *Law Without Order* lamented the lack of guidance given to judges and the widely disparate sentences that sometimes resulted:

> [O]ur legislators have not done the most rudimentary job of enacting meaningful sentencing “laws” when they have neglected even to sketch democratically determined statements of basic purpose. Left at large, wandering in deserts of uncharted discretion, the judges suit their own value systems insofar as they think about the problem at all.49

Interestingly, prosecutors appeared to make little effort to prevent sentencing disparity in the pre-Guidelines era. Even though prosecutors would have been well positioned to inform judges about comparable sentences received by similarly situated defendants (at least within the same district), there is little evidence that prosecutors did so with any regularity.50

---

48 See *Williams*, 337 U.S. at 247-48 (noting that the sentencing judge could consider "the fullest information possible about the defendant's life and characteristics"); *Wheeler, Mann & Sarat*, supra note 38, at 88-92, 102-105 (discussing various factors considered by judges in setting sentences for white-collar offenders); *Frankel*, supra note 40, at 7-8, 18-25 (discussing factors considered by judges in setting sentences). Such cases abound. See, e.g., United States v. Hernandez, 617 F. Supp. 83, 84 (S.D.N.Y. 1985) (noting that a co-defendant was given leniency because of his age (25), remorse, and drug addiction); United States v. Bergman, 416 F. Supp. 496, 501 (S.D.N.Y. 1976) (considering, among other things, the defendant's lack of criminal history, age, health, employment and charitable works).

49 *Frankel*, supra note 40, at 7-8.

50 See *Wheeler, Mann & Sarat*, supra note 38 at 29-53.
C. The Mandatory Guidelines Era: Sentencing by Commission

A number of forces combined to spell the end of the pre-Guidelines era: Judge Frankel’s criticism of sentencing disparity, the demise of rehabilitation as a widely accepted basis for punishment, and a fear of rising crime that was blamed on “soft” judges and individualized sentences. As a result, in 1984, after a decade of effort by sentencing reformers, Congress enacted the Sentencing Reform Act, which fundamentally restructured sentencing by eliminating parole, creating the Sentencing Commission, and leading directly to the creation of the Sentencing Guidelines.

The centerpiece of the Sentencing Reform Act appears in 18 U.S.C. § 3553. In its first section, titled “Factors to be considered in imposing a sentence,” the statute articulates the principles of punishment underlying the Sentencing Reform Act. It is worth reproducing the entire list:

(a) The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines ... issued by the Sentencing Commission ...;
(5) any 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 offense.52

Thus, the Sentencing Reform Act’s first principle is parsimony – the sentence shall be “sufficient, but not greater than necessary,” to comply with the purposes of punishment.53 The Act then instructs the sentencing judge to consider the basic principles of punishment: retributive desert (a determination of “just punishment” based on an evaluation of the “nature and circumstances of the offense” – including the “seriousness of the offense – and the “history and characteristics of the defendant”)54 and utilitarian crime prevention (including deterrence, incapacitation, and rehabilitation).55 The Act further instructs the sentencing judge to consider sentencing alternatives,56 the Guidelines,57 the need for uniformity,58 and the need for restitution.59

Although these instructions to sentencing judges reflect Congress’s articulation of the core principles of sentencing, § 3553(a) received scant attention from sentencing judges, because the very next subsection

53 Id. (emphasis added).
55 See 18 U.S.C. § 3553(a)(2)(B), (C), and (D) (2003).
mandated that judges impose sentences within the narrow ranges set by the Sentencing Commission:

(b) Application of guidelines in imposing a sentence.-- 
   (1) In general.-- . . . [T]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.60

Thus, while § 3553(a) instructed judges to consider the broad purposes of sentencing, § 3553(b) mandated that judges follow the Guidelines. The discretion left to sentencing judges – choosing a sentence within the mandatory Guidelines range or choosing to depart from the Guidelines range when the Commission failed to adequately consider a particular sentencing factor – was minimal.61 In essence, the responsibility to consider the principles of punishment was delegated to the Sentencing Commission.62 The goal, then, of the sentencing process engaged in by the prosecutor, defense lawyer, and judge was not to arrive at the “just” sentence, but rather to arrive at the correct Guidelines calculation.

61 The Sentencing Reform Act required that the ranges established by the Commission be narrow. See 28 U.S.C. § 994(b)(2) (2006) (instructing the Sentencing Commission that “[i]f a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months”).
62 Interestingly, the Commission, after much debate, largely avoided considering the basic principles of punishment, and instead chose to base the Guidelines ranges on a detailed study of average sentences in the pre-Guidelines era:
   Faced, on the one hand, with those who advocated 'just deserts' but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated 'deterrence' but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice.
The dawning of the mandatory Guidelines era drastically changed prosecutors’ role at sentencing. No longer were prosecutors passive bystanders who stood mute while the sentencing judges exercised their discretion. Instead, prosecutors were active participants. But the sentencing reforms neither required nor encouraged prosecutors to address the purposes of punishment or the fundamental justice of the sentence. Indeed, both the Sentencing Commission and the Department of Justice discouraged prosecutors from being anything more than sentencing technicians.

Under the mandatory Sentencing Guidelines, which went into effect in 1987, sentences were determined by reference to the infamous "sentencing grid," which establishes over 250 separate sentencing ranges. No longer were sentences individualized. Instead, a defendant's sentencing range was determined by combining a mathematical score for the seriousness of the offense with a mathematical score for the defendant's criminal history.

The resulting process, as intended, significantly restricted judicial discretion. Most obviously, the factors that determined the seriousness of the offense (such as the amount of money stolen, the extent of the physical injury inflicted, or the quantity of drugs distributed) and the factors that determined the blameworthiness of the offender (such as the defendant's role in the offense or abuse of a position of trust) were spelled out by the Sentencing Commission in minute detail. Notably, many of the individual offender characteristics that often played a central role in pre-Guidelines sentencing were given no effect in the mathematical calculation. Moreover, to the extent that judges retained discretion to decide where

---


64 For a good introduction to how the Guidelines work, see Frank O. Bowman, III, The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 Wis. L. Rev. 679, 690-704; see also Breyer, supra note 62, at 6-31 (1988).

65 Frank O. Bowman III, Places in the Heartland: Departure Jurisprudence After Koon, 9 FED. SENT’G. REP. 19, 19 (1996) ("The whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by the courts of appeals."). See also STITH & CABRANES, supra note 51, at 78-103 (criticizing the Guidelines for restricting judicial discretion).

66 See SENTENCING GUIDELINES, ch. 5, pt. H (2005) (hereinafter “SENTENCING GUIDELINES”) (describing age, education and vocational skills, mental and emotional conditions, physical condition, employment record, family ties and responsibilities, military, civic, charitable, and public service, and prior good works as “not ordinary relevant”).

---

within a particular guideline range the defendant should be sentenced. The ranges in the Guidelines grid were exceedingly narrow – at least when compared to pre-Guidelines law.

It has often been argued that the Sentencing Guidelines, in restricting judicial discretion, simply shifted that discretion to prosecutors. The Sentencing Guidelines, however, were carefully structured to restrict prosecutorial discretion. In creating the Guidelines, the Sentencing Commission had to make a fundamental structural choice. It could adopt a "charge-offense" system, in which a defendant's sentence was determined by the charge. Or, it could adopt a "real-offense" system, in which the defendant's sentence was determined by the underlying conduct, without regard for the particular charge.

67 Judges were still free to consider most individual sentencing factors in deciding what sentence to impose within the relatively narrow Guidelines sentencing range. See SENTENCING GUIDELINES § 5C1.1(A) (2000) (“A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.”).

68 Most federal criminal statutes provide only a maximum sentence, so the statutory range is almost always a term of many years. See, e.g., 18 U.S.C. § 2113(d) (2001) (sentence for armed bank robbery is “not more than twenty-five years”); 18 U.S.C. § 201 (2001) (sentence for bribing a public official is “not more than fifteen years”). The Sentencing Reform Act of 1984, by contrast, mandated that the minimum of any Guidelines sentencing range not exceed the maximum by more than twenty-five percent. See 28 U.S.C. § 994(b)(2) (2006); SENTENCING GUIDELINES ch. 1, pt. A(4)(h) (2000). Thus, the armed bank robber who faced a pre-Guidelines sentence of between zero and 300 months would face a Guidelines sentence of between 70 and 87 months. See id. at § 2B3.1. Similarly, the defendant who paid a $10,000 bribe to a judge and faced a pre-Guidelines sentence between zero and 180 months would now face a Guidelines sentencing of between 27 and 33 months. See id. at § 2C3.1.

69 See Julie R. O'Sullivan, In Defense Of The U.S. Sentencing Guidelines' Modified Real-Offense System, 91 Nw. L. Rev. 342 (1997) (summarizing the ways in which the Guidelines “real offense” system minimizes the effect of prosecutorial charging decisions). Of course, the Guidelines did greatly reduce judicial discretion, but most of that power was shifted to the Sentencing Commission. See James B. Burns, Barry Rand Elden, Brian W. Blanchard, We Make The Better Target (But The Guidelines Shifted Power From The Judiciary To Congress, Not From The Judiciary To The Prosecution), 91 Nw. U.L. Rev. 1317 (1997). To the extent that prosecutorial power over sentencing increased in the Guidelines era, that power mostly resulted from mandatory statutory sentences, not from the Guidelines themselves. See infra notes 108-163 and accompanying text.

Each system has its strengths and drawbacks. In a pure "real-offense" system, no fact is irrelevant to the sentence. The sentencing court may consider (or must consider) all facts about the offense and all facts about the offender that could affect an evaluation of the defendant's culpability, the defendant's dangerousness, the defendant's potential for rehabilitation, and the need for deterrence. This kind of system allows the maximum individualization of sentence. The pre-Guidelines sentencing system was, at least potentially, a pure real-offense system because judges were allowed (though not required) to consider almost anything in imposing a sentence. Under the pre-Guidelines system, however, judges enjoyed unfettered discretion in deciding which "real-offense" facts to consider and what weight to give those facts. The inevitable sentencing disparities that resulted from this system were the main impetus for the Sentencing Guidelines. And because the Guidelines were created to ensure uniformity and proportionality in sentencing, any real-offense fact to be considered at sentencing needed to be catalogued and quantified so that it would be applied consistently to different defendants. Such a complete catalogue of real-offense facts would be impossible to create and unwieldy to apply.

In a pure charge-offense system, on the other hand, the only relevant fact is the offense of conviction, and all defendants who are convicted of a particular offense receive the same sentence. Although such a system is

71 See Yellen, supra note 66, at 412.
72 See id. at 418; Stephen J. Schulhofer, Due Process at Sentencing, 128 U. PA. L. REV. 733, 765-68 (1980). In the seminal pre-Guidelines sentencing case of Williams v. New York, the Supreme Court noted that "modern concepts individualizing punishment" make "possessing of the fullest information possible concerning the defendant's life and characteristics" not just "highly relevant," but "essential" to the "selection of an appropriate sentence." 337 U.S. 241, 247 (1949).
73 See Yellen, supra note 66, at 418.
74 See Stith & Koh, supra note 51, at 290 n.96.
75 See Sentencing Guidelines § 1A1.1, pt A(3) (2003) (in addition to achieving "honesty in sentencing," when it created the Guidelines, Congress sought "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders" and "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.")
76 As the original Commission noted: "A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect." Id.
easy to create and simple to apply, it has two problems. First, it creates a false uniformity (where differently situated defendants are treated the same) that offends basic principles of proportionality. Second, it creates the potential for wide disparities because prosecutors have the power to choose among different charges with different potential sentences. With prosecutorial discretion unbounded by judicial review or enforceable guidelines, idiosyncratic prosecutorial charging decisions would inevitably produce unwarranted disparities.

In the pre-Guidelines sentencing system, the charge determined the sentencing range. But because most federal crimes carried only maximum sentences, the statutory sentencing range rarely affected the sentence. By manipulating the charges, the prosecutor could "cap" the defendant's sentence at a particular maximum, but the judge still had discretion to sentence the defendant to something far less than the maximum.

In navigating between the "Scylla and Charybdis" of real-offense and charge-offense sentencing, the Sentencing Commission chose a middle course, but one that drifts much closer to a real-offense system. The "modified real-offense" system chosen by the Commission starts with a charge-offense foundation: the offense of conviction determines the base offense level. After that, however, the system incorporates many real-offense facts. First, the base offense level is modified by "specific offense

77 By way of example, imagine two defendants who each commit a mail fraud. The first defendant obtains millions of dollars by engaging in a complex Ponzi scheme involving numerous underlings that defrauds hundreds of vulnerable senior citizens of their life saving (and this defendant has done it before). The second defendant submits one fraudulent insurance claim and obtains a few thousand dollars. Under a pure charge-offense system, both defendants would be convicted of mail fraud and would receive the same sentence, even though the first defendant is far more culpable and his offense is far more serious. See O'Sullivan, supra note 66, at 1345-46. A charge-offense system could reduce this disproportionality by creating different degrees of crimes (as most state codes so). But until the federal criminal law is completely revised into a coherent code, see Joost, supra note 24 (describing the history of (failed) efforts at reforming and recodifying federal criminal law), that particular kind of charge-based system will remain impossible for federal sentencing.

78 See O'Sullivan, supra note 66, at 1346.

79 See Frank O. Bowman III, Symposium, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 COLUM. L. REV. 1315, 1338 (showing that prosecutors had the ability "to place a de facto cap" on the defendant's sentence in the pre-Guidelines era).

80 See Yellen, supra note 70, at 405.

characteristics" contained in each guideline. Second, the offense level is adjusted based upon general factors such as the defendant's role in the offense. Third, the sentencing range is determined by combining the offense level with a detailed calculation of the defendant's criminal history. And finally, the Guidelines authorize departures for the sentencing range when the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."82

Thus, at least in theory, the prosecutor's charging decision determines the starting point for the Guidelines calculation, while the real-offense facts determine the rest of the calculation. Nevertheless, even the prosecutor's power to control the starting point for the Guidelines' calculation is severely constrained by two important structural aspects of the Guidelines. First, the Guidelines do not contain a separate base offense level for every offense. Instead, similar offenses (or offenses that may be based upon similar conduct) are given the same base offense level. For example, federal criminal law contains dozens, if not hundreds, of different fraud, theft, and embezzlement offenses. Yet almost all of them are sentenced based upon the same guideline. Thus, although a defendant who submits a fraudulent claim to the government may be charged with mail fraud, wire fraud, theft of public money, false claims, false statement, conspiracy, or any combination of the above,83 it matters little for his Guidelines calculation which charge the prosecutor chooses. Regardless of the crime (or crimes) charged, the defendant's Guidelines range will be determined under section 2B1.1 of the Sentencing Guidelines.84 Similarly with drug offenses, a defendant who produces methamphetamine in Canada and then flies to the United States where he delivers it to a confederate could be charged with manufacturing, distributing, or possessing with intent to distribute

83 See supra notes 24-31 and accompanying text.
84 See Sentencing Guidelines § 2B1.1 (2007). For example, a defendant who steals $2 million and pleads guilty will likely be facing a guidelines sentence of either 30-37 months (if he pleads guilty to theft of public funds, false statement, false claims, or conspiracy) or 33-41 months (if he pleads guilty to mail fraud or wire fraud). See id.
narcotics, importing narcotics, possessing narcotics on an aircraft arriving in the United States, manufacturing narcotics with an intent to import, or conspiracy to commit any of those offenses. If he did it on multiple occasions, he could be charged with multiple counts for each occasion. Nevertheless, regardless of the charge or charges chosen by the prosecutor, the defendant's Guidelines range will be determined under section 2D1.1 of the Guidelines.

The second structural way in which the Guidelines reduce the impact of prosecutorial charging decisions is through the concept of "relevant conduct." Under this controversial (and much criticized) aspect of the Guidelines, a defendant's Guidelines calculation may include conduct for which he was not convicted if that conduct was "part of the same course of conduct or common scheme or plan as the offense of conviction." Thus, a prosecutor often cannot control a defendant's offense level by declining to charge particular conduct, because that conduct will be included in the sentencing calculation anyway as relevant conduct.

---

90 See SENTENCING GUIDELINES § 2D1.1. For example, a first offender who imported one gram of pure methamphetamine on three occasions (for a total of three grams) and pleaded guilty would likely be facing a guidelines sentence of 30-37 months regardless of the charge or combination of charges.
91 See SENTENCING GUIDELINES § 1B1.3(a)(2). See generally Yellen, supra note 70; O'Sullivan, supra note 69, at 343-349 (1997); Breyer, supra note 62, at 8-12 (1988).
92 Despite this structural limitation on prosecutors' ability to affect the offense level, prosecutors can nevertheless use a variety of informal mechanisms to manipulate the Guidelines' calculation. The most common is fact bargaining, where the prosecutor and defense attorney stipulate to a version of the facts less serious than supported by the evidence. See Nancy King, Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment, 58 STAN. L. REV. 293, 294 (2005) (suggesting greater judicial oversight as a way to combat fact bargaining); see also United States v. Booker, 125 S. Ct. 738, 762 (2005) (Stevens, J., dissenting) (noting that fact bargaining is "quite common under the current system"). While fact bargaining is no doubt prevalent (despite the constant efforts of Justice Department policy makers to eliminate it, see infra notes 104-107 and accompanying text), it cannot be done without the active participation of the defense attorney and the acquiescence of the judge. Thus, while it enables a prosecutor to negotiate a particular sentence, it does not allow the prosecutor to control the sentence.
This real-offense system is quite specifically designed to alleviate some of the perceived problems with prosecutorial charging discretion. As Kenneth Davis recognized some thirty-five years ago, the perniciousness of unfettered discretion most often manifests itself in unwarranted leniency. The Guidelines themselves were motivated in large part because lawmakers perceived that judges were doling out discretionary leniency in a way that favored "white, middle-class offenders." Similarly, prosecutorial discretion most often appears in grants of leniency – whether in the decision not to charge at all or in the decision to allow a defendant to plead to reduced charges. While leniency – particularly in today's world of harsh sentences – might not seem like much of a problem, the obvious danger is that it will be distributed inequitably. And though the Guidelines' modified real-offense system is not perfect, by and large it has worked to minimize the potentially disparate effects of prosecutorial charging decisions.

93 See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 176-180, 231-32 (1969) ("The inescapable reality, insufficiently appreciated, is that the discretionary power of public officers ... to be lenient is always intrinsically a discretionary power ... not to be lenient and is susceptible to many kinds of abuse, including the worst sort of discrimination, favoritism, or caprice ... ").

94 See Stith & Koh, supra note 74, at 231.

95 See Davis, supra note 89, at 188-191 ("The affirmative power to prosecute is enormous, but the negative power to withhold prosecution may be even greater, because it is less protected against abuse."); Vorenberg, supra note 7, at 1527 ("Lenient treatment ... is most likely to be available to well-to-do offenders since their prior records will look better and they will have easier access to psychiatric or other help.").

96 There are still three ways in which prosecutors can manipulate the Guidelines to grant leniency to particular defendants. First, prosecutors can charge an offense with a statutory maximum penalty below the Guidelines sentencing range. For example, a defendant arrested for distributing a large quantity of narcotics might be facing a Guidelines sentencing range of 121-151 months. A lenient-minded prosecutor, however, might nevertheless charge the defendant with a offense that carries a maximum sentence of five years (conspiracy, 18 U.S.C. § 371), four years (use of communications facility to commit a drug offense, 21 U.S.C. § 843(b)), or three years (misprision of felony, 18 U.S.C. § 4). See Frank O. Bowman, III, FEAR OF LAW: THOUGHTS ON JUDGING AND THE SENTENCING GUIDELINES, 44 ST. LOUIS U. L.J. 299, 345 (2000). A second way in which prosecutors can manipulate the Guidelines' system is to engage in "fact bargaining" – something necessarily done with the encouragement of the defense attorney and often done with the acquiescence of the judge. See id. at 347 (describing fact bargaining as "[t]he most direct, if disingenuous, method of evading a fact-driven real offense sentencing system"). Prosecutors can also use cooperation departures to avoid sentences determined by the facts of the defendant's offense. See Simons, supra note 6, at 944-45.

97 See O'Sullivan, supra note 69.
In the quest to eliminate disparity, however, the Guidelines discouraged prosecutorial engagement with sentencing justice. When the Guidelines were mandatory, the calculation determined the sentence. Thus, for prosecutors, the key role to play at sentencing – indeed, the only role – was as a sentencing technician. The prosecutor’s job was simply to present sentencing facts and to advocate for particular calculations as a result of those facts. Inevitably, the factual questions raised by Guidelines calculations touch on the principles of punishment. For example, a calculation of the “loss” caused by an offense is relevant to a determination of the harm, which affects both the wrongdoer’s desert and the need for deterrence. Or, a determination of whether a crime involved “sophisticated means” is some measure of the wrongdoer’s culpability and of the extent to which the crime is deterrable. Similarly, a determination of whether a criminal activity involved four participants or five participants has some relevance to the activities’ dangerousness. But, all of these measures are inexact, at best, in identifying those defendants most deserving of punishment or those crimes most requiring deterrence. More importantly, what mattered in sentencing under the mandatory Guidelines was the individual determinations that went into the calculation, not the underlying principles of punishment.

Department of Justice policies encouraged – indeed, required – prosecutors to view the goal of Guidelines sentencing as a uniform application of technical rules rather than as a just application of the principles of punishment. In July 2003, then Attorney General John Ashcroft issued a memorandum to all federal prosecutors instructing them on Department of Justice policies regarding sentencing recommendations and sentencing appeals. The memorandum makes clear that a

---

98 Judges did retain the discretion to choose a sentence within the range set by the Guidelines. Those ranges, however, are so narrow that little turns on the decision.


The prosecutor’s role at sentencing is ensure consistent application of the mandatory Guidelines, not to decide questions of sentencing justice:

[F]undamental policy choices as to the range of permissible sentences are ultimately for the Congress to make. . . . Department attorneys must ensure that the Sentencing Guidelines are applied as Congress and the Sentencing Commission intended them to be applied, regardless of whether an individual prosecutor agrees with the policy decision.103

The prosecutor’s objective, in this model, is simple: consistency, predictability, and uniformity. Questions of “justice” are left to others.

Of course, prosecutors are not automatons, and it is inevitable that they will consider the justice of their sentencing calculations. And, while the Guidelines are structured to make those sorts of considerations irrelevant, prosecutors still found ways under mandatory Guidelines to influence sentencing outcomes. For one, prosecutors could engage in “fact bargaining,” either by controlling the information that is disclosed to the court or by stipulating to certain facts in the hope that the court will simply accept the stipulation.104 Prosecutors could also agree to (or not oppose) requests for departures, even if those requests were not fully supported by the facts of the case. The very purpose of the Ashcroft Memorandum, though, is stamp out this kind of thinking and these kinds of practices. For example, the memorandum explicitly prohibits fact bargaining,105 requires prosecutors to disclose all relevant sentencing facts to the court,106 and

103 Id.
104 For a detailed discussion of these practices, see Nancy King, Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment, 58 STAN. L. REV. 293, 294 (2005) (suggesting greater judicial oversight as a way to combat fact bargaining).
105 Ashcroft Sentencing Memo, supra note 102, at 3 (mandating that federal prosecutors not “‘fact bargain,’ or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing” nor may they “reach agreements about Sentencing Guidelines factors that are not fully consistent with the readily provable facts.”).
106 Id. at 2 (noting that “if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office” including, for example “additional drug amounts or fraud losses”).
requires prosecutors “to oppose any sentencing adjustments, including downward departures, that are not supported by the facts and the law.” \(^{107}\)

On one level, this official prosecutorial disengagement from the principles of punishment is not particularly troubling. In theory, at least, sentencing justice will be achieved by combining the policy decisions of the Sentencing Commission with the factual determinations of the sentencing judge. One problem with this view is that it ignores the reality of plea bargaining. In the course of negotiating plea agreements, it is inevitable that prosecutors will consider the justice of their sentencing calculations. By officially forbidding such considerations of sentencing justice, Department of Justice policies simply hide the practice from public view and from internal oversight. To the extent that prosecutors considered the justice of their mandatory sentencing calculations, they did so in secret, without articulating their reasons to the court or to the public, and without justifying their results by reference to any accepted principles.

This vision of prosecutorial disengagement from sentencing justice is even more troubling when considered in light of prosecutors’ power to affect the sentence through charging decisions. As noted above, the Guidelines’ real-offense system is designed to minimize the effect of charging decisions. And the system largely works, but with one major exception: mandatory sentences.

III. MANDATORY SENTENCES: SENTENCING BY PROSECUTORS

At the same time that Congress enacted the mandatory Guidelines, it also began creating crimes that carried statutory minimum sentences. While there may still be debate about the extent to which the Sentencing Guidelines shifted sentencing power to prosecutors,\(^{108}\) there is no question that mandatory sentences shifted enormous sentencing authority to

\(^{107}\) Id. at 3 (emphasis in original).

prosecutors.\textsuperscript{109} And this shift is significant, given that nearly half of all federal criminal prosecutions involve narcotics or firearms charges, the main areas in which mandatory sentences apply.\textsuperscript{110} This shift in sentencing authority has also been much criticized – largely because is it fundamentally inconsistent with the division of discretion and responsibility established by the Guidelines.\textsuperscript{111}

But before examining the ways in which mandatory sentences distort the Guidelines, it is necessary to distinguish between different types of mandatory sentences. They come in two types: mandatory minimums and sentencing enhancements. Mandatory minimum sentences establish a minimum sentence of imprisonment for particular criminal conduct. By far the most important mandatory minimum sentences are those that apply to narcotics offenses.\textsuperscript{112} Sentencing enhancements, on the other hand, are mechanisms that increase an otherwise applicable sentence, usually because the defendant has a prior record\textsuperscript{113} or used a firearm in committing the


\textsuperscript{110} In 2006, 35.5\% of the federal criminal docket was narcotics cases and 11.7\% were firearms cases. See \textit{United States Sentencing Commission, 2006 Sourcebook of Federal Sentencing Statistics}, Figure A. Approximately two-thirds of the drug cases involved a statutory mandatory minimum sentence. See id. at Table 43.


\textsuperscript{112} See 21 U.S.C. § 841(b) (2006). While there are a limited number of mandatory minimum sentences that apply to non-narcotics offenses, those offenses are rarely prosecuted. See \textit{United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 37} (1991) ("\textit{Report on Mandatory Minimum Penalties}") ("In the Federal Criminal Code today, over 60 criminal statutes contain mandatory minimum sentencing provisions. However, only a small number of statutes, those regulating drug and weapons offenses, account for most of the convictions. For most statutes carrying mandatory minimum sentence provisions, convictions are quite rare."). The only non-narcotics minimum sentence used with any regularity is § 924(c), which, as explained below, is more properly understood as a sentencing enhancement.

\textsuperscript{113} See, e.g., 21 U.S.C. § 851 (1970) (doubling the otherwise applicable mandatory minimum sentence if the defendant has a prior felony drug conviction).
underlying offense.  

By definition, sentencing enhancements are not incorporated into the Sentencing Guidelines.

A. Mandatory Minimum Sentences and the Guidelines

During the 1970s and much of the 1980s, few federal crimes carried mandatory penalties.  

By the mid-1980s, however, public fear of drugs and drug-related crime had reached new heights.  

In 1986, Congress responded with the Anti-Drug Abuse Act of 1986, which fundamentally changed federal drug sentences by establishing mandatory minimum penalties for offenses involving certain quantities of drugs.  

In 1988, Congress stiffened those minimum penalties to levels where they remain today.  

Thus, a defendant convicted of a crime involving one kilogram of heroin, five kilograms of cocaine, or fifty grams of crack now faces a mandatory minimum sentence of ten years’ imprisonment.  

A defendant

---

114 See 18 U.S.C. § 924(c) (2006) (providing various minimum penalties if a defendant "uses or carries a firearm" in connection with "a crime of violence or drug trafficking crime").


116 David Sklansky has convincingly argued that the fear of rising drug crime – especially crime related to crack cocaine – was essentially race-based. See David A. Sklansky, Cocaine, Race, and Equal Protection, 47 STAN L. REV. 1283, 1302 (1995). Crack was seen as "a black drug, sold by black men" and "much of the public anxiety about the feared narcotic stemmed from a concern that use of the drug was spreading beyond the confines of the minority group with which it traditionally had been associated." Id. at 1292-94. See also Eric Sterling, The Sentencing Boomerang: Drug Prohibition, Politics and Reform, 40 VILL. L. REV. 383, 391-395 (1995) (discussing how the "cynical exploitation of racial fear and hatred" has been a central legislative strategy in the enactment of narcotics prohibition" throughout the 1900s).

117 Pub. L. No. 99-570, 110 Stat. 3207 (1986) (codified as amended in 21 U.S.C. §§ 841-969). Like most “comprehensive” crime bills, the 1986 Act was passed in October of a national election year. See Simons, supra note 25, at 902-907 (summarizing the history of federal criminal law and noting that since 1984 every national election year has seen significant federal criminal legislation); REPORT ON MANDATORY MINIMUM PENALTIES, supra note 112, at 17 (1991) ("Beginning in 1984, and every two years thereafter, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime.").


convicted of a crime involving one hundred grams of heroin, five hundred grams of cocaine, or five grams of crack now faces a mandatory minimum sentence of five years’ imprisonment.120

At least in theory, these mandatory minimums give prosecutors significantly more control over a defendant’s sentence. Because the mandatory minimum is triggered by the charge, the minimum sentence applies only if the prosecutor includes the relevant charge. So for example, if a defendant is arrested after distributing ten kilograms of cocaine, the prosecutor could elect to file a narcotics distribution charge with a statutory sentencing range of zero to twenty years,121 a charge with a statutory sentencing range of five to forty years, 122 or a charge with a statutory sentencing range of ten years to life. 123

In practice, however, the effect of the charging decision was significantly constrained by the mandatory Guidelines. While the statutory charge set the outer parameters of the sentence, the sentence itself was determined by the Sentencing Guidelines, and the mandatory minimum sentences have been incorporated into the Guidelines’ sentencing ranges.124 As a result, Guidelines ranges for drug offenses are determined largely by the quantity of the drug involved, and those sentences are directly proportional to the mandatory minimum sentences established by Congress.125 Thus, regardless of the charge filed by the prosecutor, if a defendant is convicted at trial of narcotics distribution, the court will make an independent finding of the quantity of narcotics involved in the offense. If the court finds that the defendant distributed ten kilograms of cocaine, the

124 See SENTENCING GUIDELINES, ch. 1, pt A, § 3 (2000) (noting that “increased and mandatory minimum sentences” of the Anti-Drug Abuse Act of 1986 required the Commission to depart from its normal practice of drafting the Guidelines to reflect pre-Guidelines practice); SITH & CABRANES, supra note 51, at 60 & n.155 (1998); REPORT ON MANDATORY MINIMUM PENALTIES, supra note 112.
125 See SENTENCING GUIDELINES § 2D1.1(c) cmt. background (2007) ("The base offense levels [for drug trafficking] are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute."). See also Bowman & Heise, supra note 111, at 1060-62 (describing the Anti-Drug Abuse Act of 1986’s impact on the Sentencing Guidelines).
defendant's base offense level under the Guidelines will be level 32, which yields a sentencing range of 121-151 months.\textsuperscript{126} 

That is not to say that the prosecutor's charging decision is not without any effect. Because statutory minimum sentences trump the Guidelines, the prosecutor can file a sentence that establishes a statutory floor below which the sentencing judge may not go. And even though the mandatory minimum sentences are incorporated into the Guidelines, such floors still matter because the base offense level is only the starting point for the Guidelines calculation. For example, if the defendant who distributed ten kilograms of cocaine decided to plead guilty, he would qualify for "acceptance of responsibility," which would reduce his offense level by three points to level 29.\textsuperscript{127} And even though level 29 carries a sentencing range of 87-108 months, the statutory minimum would prevent the judge from imposing any sentence less than 120 months.\textsuperscript{128} This "floor effect" would be even greater if the defendant were a "minor participant" in the offense entitled to a reduction of up to four levels.\textsuperscript{129} If this minor participant's offense level were reduced to level 25, the statutorily required minimum sentence of 120 months would be approximately double the otherwise applicable Guidelines' sentence.\textsuperscript{130} 

In 1994, however, Congress acted to ameliorate the harshest effects of the mandatory minimums for the least culpable defendants.\textsuperscript{131} Under a provision known as the "safety valve," non-violent narcotics defendants with little or no criminal history are exempt from the mandatory minimums.\textsuperscript{132} Because those are the defendants most likely to end up with a

\textsuperscript{126} See Sentencing Guidelines §§ 2D1.1(c)(4) (2007). If the defendant has a criminal history, the sentencing range for level 32 would be higher. See id.


\textsuperscript{128} See Sentencing Guidelines § 5G1.1(b) (1989) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").


\textsuperscript{130} At offense level 25, a defendant with no significant criminal history would be facing a Guidelines' range of 57-71 months. See Sentencing Guidelines § ., ch. 5, Ppt. A.

\textsuperscript{131} Bowman & Heise, supra note 111, at 1069-74 (explaining "safety valve" exception to mandatory minimum drug sentences).

Guidelines’ sentencing range below the mandatory minimum, the "safety valve" has substantially reduced the situations in which the charge rather than the underlying facts determines the sentence.  

Of course, there are still some narcotics defendants for whom the mandatory minimum charge (as opposed to the Guidelines calculation) determines the ultimate sentence – most notably defendants who are minor participants in a drug conspiracy but are ineligible for the safety valve because of a modest criminal history. In ways that are fundamentally inconsistent with the Guidelines’ real offense foundations, these defendants are still subject to the charging whims of individual prosecutors. Nevertheless, the incorporation of the mandatory minimums into the Guidelines’ sentencing ranges and use of the safety valve have combined to minimize the numbers of such cases. As a result, even though mandatory minimum sentences "trump" the Sentencing Guidelines, a prosecutor’s decision to charge a mandatory minimum usually will not markedly change the defendant’s sentence. So there is usually little reason for prosecutors to ponder whether their charge is consistent with the principles of punishment – unless the prosecutor is considering charging a sentencing enhancement.

B. Sentencing Enhancements

The term "sentencing enhancement" is not subject to precise usage, particularly as distinguished from "mandatory minimum." As I use the term, however, a sentencing enhancement differs from a mandatory minimum in three important ways: (1) a sentencing enhancement applies only if the defendant has already committed some other underlying crime; (2) the sentencing enhancement applies only if the prosecutor elects to

133 Bowman & Heise, supra note 111, at 1071 (“In 1996, the percentage of drug cases receiving either a statutory or Guidelines safety valve reduction totaled 19.2%.”).

134 For example, a defendant with a criminal history category of II would be ineligible for the safety valve. If that defendant were a minimal participant in a ten-kilogram cocaine conspiracy, his Guidelines sentencing range after a guilty plea would be 63-71 months, see U.S. SENTENCING GUIDELINES §§ 2D1.1(c)(4) (2007), 3B1.2(a) (2002), 3E1.1, Ch. 5 (2003), but his statutory minimum sentence would be 120 months, see 18 U.S.C. § 841(b)(1)(A) (2002).
charge it; and (3) the sentencing enhancement has not been incorporated into the Guidelines calculation for the underlying crime.\footnote{Others have used slightly different terminology. See, e.g., Memorandum from Attorney General John Ashcroft to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (September 2003) (hereinafter “Ashcroft Charging Memo 3 (referring to “statutory enhancements”).}

While dozens of sentencing enhancements are scattered throughout the federal criminal law, two are particularly important. The first is the “prior felony” enhancement for drug offenses, which doubles the otherwise applicable mandatory minimum sentence if the defendant has a prior conviction for a felony drug offense.\footnote{See 21 U.S.C. § 851 (providing that the mandatory minimum sentences of five and ten years in 12 U.S.C. § 841(b) are increased to ten and twenty years respectively if the prosecutor files an “information” with the court charging that the defendant has a prior felony drug offense).} It is, of course, not uncommon for a defendant's sentence to be affected by prior convictions.\footnote{Every Guidelines sentencing range is determined in part by the defendant's criminal history score. See SENTENCING GUIDELINES § 1B1.1.} What is unusual about this enhancement, however, is that it is not automatic. Unlike other enhancements for criminal history, the prior felony enhancement for drug offenses applies only if the prosecutor “charges” the enhancement by filing what is called a “prior felony information.”\footnote{See 21 U.S.C. § 851. First enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, section 851 replaced a prior recidivist provision that did not give the prosecutor any discretion over the sentencing enhancement. See United States v. Noland, 495 F.2d 529, 530 (5th Cir. 1974) (quoting 26 U.S.C. § 7237(c)(2) (1964)). This infusion of prosecutorial discretion was intentional: The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 reveals that one major goal of the Act was to make more flexible the penalty structure for drug offenses. The purpose was to eliminate “the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.” Mandatory minimum sentencing was abolished to permit greater prosecutorial and judicial flexibility. … In keeping with this purpose, the new statutory scheme contemplates prosecutorial discretion to seek enhancement. Id. (quoting H.Rep.No.91-1444, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News, pp. 4566, 4576). See also United States v. Severino, 268 F.3d 850 (9th Cir. 2001) (“The theory of the Act was to eliminate mandatory sentences and to invest prosecutors with discretion as to whether to seek enhanced sentences and which prior convictions to invoke. Thus, the statutory scheme was completely inverted: rather than requiring courts to impose mandatory minimums regardless of prosecutorial desire, courts were prohibited from enhancing sentences unless the government had timely filed an information stating that it intended to seek an enhanced sentence based on specific prior convictions.”).}

The other major sentencing enhancement is the enhancement for any person who “uses or carries” a firearm “during and in relation to a crime of violence or drug trafficking crime.” This enhancement – known as § 924(c) – is unusual for two reasons: first, the mandatory sentence of five, seven or ten years (depending on whether the gun was possessed, brandished, or discharged) must be served consecutively to any sentence imposed for the underlying drug crime or crime of violence; second, the mandatory sentence for any second or subsequent offense is an additional twenty-five-year consecutive sentence. Again, this enhancement applies only if the prosecutor includes the § 924(c) violation as a separate charge.

The important practical difference between mandatory minimums and sentencing enhancements is the extent to which they "trump" the Guidelines. Because mandatory minimums have been incorporated into the Guidelines’ offense levels, the effect of the prosecutor's decision to charge a mandatory minimum is usually minimal. Sentencing enhancements, on the other hand, have not been incorporated into the Guidelines’ offense levels and therefore quite often generate sentences far different from the otherwise applicable Guidelines sentences.

In contrast, other statutory enhancements based on criminal history apply without any prosecutorial action. See, e.g., 18 U.S.C. § 924(e) (2006) (providing a mandatory fifteen-year sentence if a person convicted of violating 18 U.S.C. § 922(g) (felon-in-possession) “has three previous convictions … for a violent felony or a serious drug offense”). Similarly, the Sentencing Guidelines enhance sentences based on the defendant’s criminal history without regard to whether the prosecutor “charges” the criminal history.

The legislative history of the firearm possession statute includes the following.

139 18 U.S.C. § 924(c) (2006). First enacted in 1968 (after the King and Kennedy assassinations), § 924 originally applied only to crimes of violence. It was extended to include drug crimes in 1986. For the full legislative history of the provision, see Pragati Bhatt Patrick and Thomas Bak, Firearms Prosecutions in the Federal Courts: Trends in the Use of 18 U.S.C. § 924(c), 6 BUFF. CRIM. L. REV. 1189, 1190-1193 (2003).

140 See 18 U.S.C. § 924(c)(1)(A), (D) (2006). In addition, if the firearm possessed is a “short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon,” the mandatory minimum sentence is 10 years. See Id. If the gun possessed is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler,” the mandatory minimum sentence is 30 years. See id.

141 See 18 U.S.C. § 924(c)(1)(C), (D) (2006). If the firearm involved in the second or subsequent offense is “a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler,” the mandatory sentence is life without parole. Id.

142 As a technical matter, the Guidelines themselves require that the sentence imposed comport with any mandatory statutory sentence. See SENTENCING GUIDELINES § 5G1.1(b) (“Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range,
enhancements create a largely charge-based system in which prosecutorial decisions determine the sentence. The very real danger from such a system is that prosecutorial charging decisions will result in both unwarranted disparity (where similarly situated defendants receive vastly different sentences) and unwarranted uniformity (where defendants with widely varying degrees of culpability received similar sentences).

C. Case Studies in Mandatory Sentencing

A series of case studies will help illustrate how sentencing enhancements can lead both to unwarranted disparity and to unwarranted uniformity.143

Case Study #1: The Kingpin and the Courier. Imagine a typical street-level narcotics distribution organization. At the top of the organization is the Kingpin, who supervises the operation, "owns" the drugs, and keeps most of the profits. In the middle are the Workers, who are paid a fixed amount for selling drugs on a daily basis. At the bottom is the Courier, who occasionally carries drugs for the Kingpin and is often paid in small quantities of drugs for his personal use.144 Now imagine that the members of this organization are arrested and that the prosecution can prove that the organization distributed at least ten kilograms of cocaine. Also imagine that Kingpin has a lengthy prior record, with convictions for misdemeanor assault, misdemeanor drug possession, and felony drug distribution. Courier has only a minimal criminal history. A rational sentencing system would distinguish between Kingpin and Courier, and the Guidelines do. Sentencing enhancements, however, do not.

143 These case studies will also illustrate the extreme (and often unwarranted) severity of sentencing enhancements. Severity, however, is not the point of this critique. Whether one believes that our current average sentence length is too high, too low, or just right, the disproportionate distribution of those sentences among different defendants is an evil to be avoided nonetheless.

144 See, e.g., United States v. Ortiz-Martinez, 1 F.3d 662, 666 (8th Cir. 1993) (describing a drug organization that fits this typical model).
Under the Guidelines, Kingpin and Courier would receive appropriately different sentences. Kingpin would start with a base offense level of 32 (for the ten kilograms of cocaine), which would then be increased to 36 for his role as the leader of the organization. His prior convictions would give him a criminal history category of III, and the resulting sentencing range would yield a minimum sentence of 235 months. Courier would start with the same base offense level of 32, but his minimal role in the offense would decrease the offense level to 28. If Courier were eligible for the safety valve, his offense level would be decreased by an additional two levels. At offense level 26, Courier's minimum Guidelines sentence would be 63 months. Thus, under the Guidelines' view of the defendants' relative culpability, based upon their differing roles in the offense and their differing criminal histories, Kingpin's minimum Guidelines sentence is almost four times higher than Courier's.

The charges that would be brought against Kingpin and Courier would likely carry mandatory minimum sentences. Those mandatory minimums, however, would have absolutely no effect on the Guidelines sentencing ranges or the statutorily available sentences. At a quantity of ten kilograms of cocaine, both defendants would be facing a mandatory minimum sentence of ten years' imprisonment. Kingpin, however, would face a Guidelines minimum sentence far in excess of ten years, and Courier would be exempt from the mandatory minimum under the safety valve. Thus, the prosecutor's decision to charge or not to charge the mandatory minimum would make no difference to the available sentences.

---

146 See Sentencing Guidelines § 3B1.1(a) (1993) (“If the defendant was an organizer or leader of a criminal activity that involved five or more participants ... increase by 4 levels.”).
147 If Kingpin's prior felony distribution conviction resulted in a sentence of at least sixty days' imprisonment, he would have at least four criminal history points, which would place him in criminal history category III. See Sentencing Guidelines § 4A1.1; Ch. 5, Pt. A (2007).
149 See supra notes 128-130 and accompanying text. To be eligible for the safety valve, Courier could have no more than one prior conviction that resulted in a sentence of less than sixty days. See 18 U.S.C. § 3553(f); Sentencing Guidelines § 4A1.1.
The situation would be somewhat different if Courier had a prior conviction that made him ineligible for the safety valve. Assume that Courier had one prior felony drug conviction that gave him a criminal history category of II. His offense level would be 28, which would yield a minimum Guidelines sentence of 87 months. The ten-year mandatory minimum, however, would trump the Guidelines sentence and raise the minimum to 120 months. Thus, the prosecutor's charging decision would require a sentence 33 months (or almost forty percent) above the Guidelines' minimum. But even then, Courier's sentence would still be approximately half of Kingpin's.

If, however, the prosecutor elected to file prior felony informations, the situation, at least for Courier, would be very different. The filing of the prior felony information would raise the statutory minimum sentence for each defendant to 240 months. Thus, Kingpin's minimum sentence would be 240 months, just two percent higher than the Guidelines' minimum of 235 months. For Courier, however, the statutory minimum sentence of 240 months would add twelve years to the Guidelines’ minimum of 87 months. Thus the prosecutor's decision to file the sentencing enhancement would almost triple Courier's sentence and would leave Courier with the same sentence as Kingpin.

Case Study #2: Worker A and Worker B. Now imagine that two of the workers in Kingpin's organization are charged not only with narcotics conspiracy, but also with two counts of narcotics distribution because on two occasions they each sold a small quantity of cocaine to an undercover FBI agent. Assume also that each Worker carried a gun during those transactions.

For Guidelines purposes, the additional distribution charges would make no difference in the calculation. Both Workers will have a base offense level of 32, plus an additional two levels for possessing a gun. Assuming no prior criminal history, both defendants’ minimum Guidelines’

---

154 In reality, few defendants charged with federal narcotics offenses have no criminal history.
sentence would be 151 months. Again, whether the prosecutor elects to charge the ten-year mandatory minimum is irrelevant because the Guidelines’ minimum exceeds the statutory minimum.

But if the prosecutor elects to charge one of the defendants with the sentencing enhancement known as a "924(c) violation," everything changes. While a § 924(c) violation is technically a separate crime – the crime of using or carrying a firearm during a crime of violence or a drug crime – it functions like a sentencing enhancement. The defendant can only be charged with a § 924(c) violation if he also committed the underlying crime, and all the § 924(c) charge does is increase the defendant's sentence for that underlying crime.\footnote{Baruch Weiss, What Were They Thinking?: The Mental States of the Aider and Abetter and the Causer Under Federal Law, 70 FORDHAM L. REV. 1341, 1384-85 (2002). It is possible for a defendant to be charged with a § 924(c) violation without also being charged with the underlying crime. But he must have in fact committed the underlying crime to be guilty of the § 924(c) violation. \textit{See id.} at 1429-30.}

Thus, if the prosecutor charges Worker A with one § 924(c) violation, Worker A’s minimum sentence will be 181 months – two-and-a-half years more than Worker B’s Guidelines’ minimum of 151 months.\footnote{Worker's offense level for the narcotics conspiracy and distribution would actually decrease to level 32, because the two-level enhancement for possessing a dangerous weapon, see Sentencing Guidelines § 2D1.1(b)(1) would not apply to avoid double counting, see \textit{SENTENCING GUIDELINES} § 2K2.4, cmt. n.4 (2006). Level 32 yields a minimum sentence of 121 months, see \textit{SENTENCING GUIDELINES}, ch. 5, pt. A, and the § 924(c) violation adds an additional 60 months to that minimum, see \textit{SENTENCING GUIDELINES} § 2K2.4 (2006).} If the prosecutor elects to charge Worker A with two § 924(c) violations, Worker A’s minimum sentence will increase to 481 months – twenty-seven-and-a-half years more than Worker B’s Guidelines’ minimum. Thus, the prosecutor's decision to file the § 924(c) charge will leave Worker A with a minimum sentence more than four times as long as Worker B’s and more than twice as long as Kingpin’s.\footnote{Of course, the prosecutor might also be able to charge Kingpin with § 924(c) violations, on a theory of vicarious liability for the crimes of a coconspirator. See Pinkerton v. U.S., 328 U.S. 640, 643 (1946) (holding that conspirators are liable for substantive crimes committed by co-conspirators in furtherance of the conspiracy, even if the conspirators did not specifically agree to commission of those additional crimes). \textit{See also} United States v. Floyd, Nos. 93-5077, 93-5078, 1994 WL 18009, at *6 (6th Cir. Jan. 21 1994) (holding that the defendants aided and abetted the possession of a firearm by conspiring with each other).}
Case Study #3: Robber and Driver. Imagine a bank robber (Robber) and his accomplice (Driver) who are arrested after committing two bank robberies. Robber was the moving force behind the robberies: he selected the banks, he obtained the needed materials, and he told Driver what to do. In each robbery, Robber went into the bank, brandished a gun, demanded money from the teller, received approximately $2,000, and then ran outside to where Driver was waiting with the getaway car. Robber has a significant criminal history, with one prior conviction for robbery and four prior convictions for misdemeanor drug offenses. Driver has no prior offenses.

Under the Guidelines, both defendants would start with a base offense level of 20, which then would be enhanced by two levels because they robbed a bank, by five levels because a gun was brandished, and by two levels because they committed two robberies. In addition, Robber would receive an additional two-level enhancement because he was the leader of the duo. Given his criminal history, Robber's minimum Guidelines' sentence would be 151 months. Driver, on the other hand, would receive a two-level reduction for his minor role in the robberies, leaving him with a minimum Guidelines' sentence of 70 months.

Thus, Robber's minimum Guidelines' sentence is 115% higher than Driver's minimum Guidelines' sentence. But if the prosecutor elects to charge both men with one § 924(c) violation, Robber's minimum sentence increases to 176 months, while Driver's increases to 125 months – leaving Robber's sentence only 40% higher than Driver's. And if the prosecutor elects to charge both men with two § 924(c) violations, Robber's minimum sentence increases to 476 months, while Driver's increases to 425 months – leaving Robber's sentence only 12% higher than Driver's. Moreover, the

in relation to a drug trafficking offense since the use and possession of the firearm was reasonably foreseeable to the defendants).

162 See SENTENCING GUIDELINES § 3B1.1(c) (1993).
163 I am assuming that Robber’s five prior convictions yield at least seven criminal history points, which would leave him with a criminal history category of IV. See SENTENCING GUIDELINES § 4A1.1, ch. 5, pt. A (2007).
The power wielded by prosecutors to charge sentencing enhancements creates obvious occasions for prosecutors to consider the principles of punishment — to consider whether a particular narcotics defendant deserves to have his sentence doubled or whether a particular robbery defendant deserves to have thirty years added to his sentence. In practice, however, prosecutors seem little concerned with the “justice” of such sentencing enhancements. Indeed, Department of Justice policies seem designed to affirmatively discourage prosecutorial engagement with the justice of sentencing enhancements.

D. Prosecutorial Discretion, Department of Justice Policy, and the Charging of Sentencing Enhancements

Sentencing enhancements create a system where prosecutors effectively choose the sentence. Neither the detailed system of uniformity and proportionality created by the Sentencing Commission nor the exercise of judicial discretion has much effect on the sentence. All that matters is whether the prosecutor elects to charge the sentencing enhancement, either by filing the “prior felony information” required by 21 U.S.C. § 851 or by adding a charge under 18 U.S.C. § 924(c). Moreover, because sentencing enhancements increase sentences so dramatically, they create a real risk that sentences will be unfairly disparate or unjustly severe.

Having been given this sentencing power, prosecutors have three options: (1) charge sentencing enhancements in all possible cases; (2) refuse to charge sentencing enhancements; or (3) charge sentencing enhancements only in selected cases. The first two options — never charging or always charging — have the significant benefit of ensuring uniformity. Nevertheless, either approach seems inconsistent with Congress’s intent in enacting the sentencing enhancement statutes. On the one hand, when Congress enacted these enhanced penalties for offenses involving guns and for repeat drug offenders, it undoubtedly expected that they would be used
by prosecutors. On the other hand, Congress specifically created these sentencing enhancements as separate offenses that must be charged by prosecutors to be triggered. Instead of creating sentencing enhancements, Congress could have simply increased the penalties for the underlying crimes. In other words, Congress could have incorporated the increased sentence – including an increased mandatory minimum sentence – directly into the statute, without requiring any additional action by the prosecutor. That Congress chose instead to require separate prosecutorial action to trigger the enhancements indicates that Congress expected prosecutors to decide when the enhancements were appropriate. And, indeed, that is what happens. But how do prosecutors decide when to file sentencing enhancements? Part of the answer may be found in Department of Justice charging policies.

The Department of Justice first promulgated rules for charging decisions in 1980. These “Principles of Federal Prosecution” contain general instructions for prosecutors making charging decisions. First, with respect to the initial decision about whether an offense should be charged, the Principles direct that prosecutors should consider the following:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

---

164 See supra notes 138-139 (summarizing legislative history).
Significantly, prosecutors are specifically directed to consider the traditional purposes of punishment: retributive desert (as determined by both harm—“nature and seriousness of the offense”—and by “culpability”) and deterrence. The commentary included in the Principles of Federal Prosecution provides further guidance on how prosecutors should evaluate harm, culpability, and the need for deterrence.\(^\text{168}\)

Once the decision to prosecute is made, however, the Principles of Federal Prosecution do not instruct prosecutors to consider the principles of punishment in deciding which charges to bring. Instead, prosecutors are instructed to charge “the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.”\(^\text{169}\) As originally promulgated, the Principles of Federal Prosecution noted that the “most serious offense” will “ordinarily” be the offense with the “most severe penalty.”\(^\text{170}\) With respect to mandatory sentences, however, the original Principles recognized that a mandatory minimum penalty set by Congress might not be appropriate in all cases in which it could be charged.\(^\text{171}\)

During the Guidelines era, the Principles of Federal Prosecution were amended by a series of directives from three different Attorneys General. First, in 1989, shortly after the Sentencing Guidelines passed Constitutional muster in the Supreme Court, Attorney General Richard Thornburgh issued a

\(^{168}\) See id. at § 9-27.230(B)(2), (3), and (4).

\(^{169}\) Id. at § 9-27.300(A).


\(^{171}\) See id. Apparently, however, the concern was a practical one: the mandatory sentence might be so grossly out of proportion to the defendant’s offense that nullification by the judge or jury might lead to an acquittal:

In many instances, the term the legislature has specified certainly would not be viewed as inappropriate. In other instances, however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant's conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.

*Id.*
memorandum instructing prosecutors to charge “the most serious, readily provable offense.” Like the original Principles of Federal Prosecution, however, the Thornburgh Memo did not discuss sentencing enhancements. Four years later, Attorney General Janet Reno issued a memorandum clarifying the factors that prosecutors should consider in making charging decisions. Although the Reno Memo maintained the general policy of charging “the most serious offense that is consistent with the nature of the defendant's conduct,” it also instructed prosecutors to ensure that the charge chosen would result in a sentence that was consistent with the principles of punishment. Specifically, the Reno Memo instructed prosecutors to make an “individualized assessment” of each case, which includes considering the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.

If the Reno Memo suggested that prosecutors should consider sentencing justice when deciding whether to file sentencing enhancements, its successor – a memorandum issued by Attorney General John Ashcroft in September 2003 – suggests that prosecutors should simply seek to maximize sentences, including by filing sentencing enhancements. Not hiding its disapproval of the “individualized assessment” promoted by the Reno Memo, the Ashcroft Memo’s stated purpose is “to re-examine the

---


174 Id. Like the Thornburg Memo, the Reno Memo did not mention sentencing enhancements, although the version of the United States Attorney’s Manual in effect, at the time, instructed prosecutors to file a prior felony information under 21 U.S.C § 851 for readily provable charges unless a high-level supervisor authorized otherwise in the context of a negotiated plea. See Richard F. Albert, Department of Justice Charging, Plea Bargaining and Sentencing Policies Under Attorneys General Thornburgh, Reno, and Ashcroft (2004) (a report of the Federal Bar Council’s Committee on Second Circuit Courts) (on file with the author).

175 See Ashcroft Charging Memo, supra note 135.
subject thoroughly and to state with greater clarity Department policy with respect to charging, disposition of charges, and sentencing.”\textsuperscript{176} The Ashcroft Memo also makes clear that the overriding policy governing charging decisions is to ensure “consistency” and to “eliminate unwarranted disparity.”\textsuperscript{177}

The Ashcroft Memo then reiterates the policy of charging the most serious offense, but in more forceful terms:

\begin{quote}
It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case, except as authorized by an Assistant Attorney General, United States Attorney, or designated supervisory attorney in the limited circumstances described below.\textsuperscript{178}
\end{quote}

In contrast to the original policy set forth in the Thornburgh Memo, the Ashcroft Memo states the policy as an imperative (“must” rather than “should”) and limits exceptions to the policy to specifically enumerated situations. In addition, the Ashcroft Memo defines the “most serious” offense as the one that yields the most punishment: “The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.”\textsuperscript{179} Gone is the notion reflected in the original Principles of Federal Prosecution that a mandatory minimum sentence might be “out of proportion to the seriousness of the defendant’s conduct.”\textsuperscript{180}

The Ashcroft Memo lists six specific exceptions to the requirement that prosecutor always charge the “most serious” offense, but none of those

\textsuperscript{176} Id. The Ashcroft Charging Memo also states that it “supersedes all previous guidance on this subject.” Id.

\textsuperscript{177} Id. (also noting that “[j]ust as the sentence a defendant receives should not depend upon which particular judge presides over the case, so too the charges a defendant faces should not depend upon the particular prosecutor assigned to handle the case”).

\textsuperscript{178} Id.

\textsuperscript{179} Id.

exceptions relates to the justice of the resulting sentence. Instead, the exceptions are justified solely by the efficient use of prosecutorial resources.\footnote{For example, prosecutors may decline to file to “most serious” charge as part of a “fast-track program,” which is designed to encourage “early dispositions” of large numbers of cases, usually involving immigration-related cases in border districts. Or, prosecutors may decline to file the “most serious” charge where necessary to secure the cooperation of a defendant in an important case. A “catch-all” exception for “extraordinary circumstances” is based on “practical limitations,” such as when “the United States Attorney’s Office is particularly over-burdened, the duration of the trial would be exceptionally long, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.” \textit{Id.}}

The Ashcroft Memo also specifically addresses sentencing enhancements, noting that they are “strongly encouraged” and that “federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases.” The Memo stops short of requiring sentencing enhancements to be charged in \textit{all} cases; but, to the extent that prosecutors are permitted to refrain from filing sentencing enhancements, the rational is not based on any notions of proportionality, parsimony, or any due consideration for the principles of punishment. Instead, prosecutors are permitted to forego sentencing enhancements only for reasons of prosecutorial efficiency:

\begin{quote}
In many cases . . . the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. Requiring the pursuit of such enhancements to trial in every case could therefore have a significant effect on the allocation of prosecutorial resources within a given district.\footnote{Ashcroft Charging Memo, \textit{supra} note 135. Specifically with respect to the statutory enhancement under 18 U.S.C. § 924(c), the Memo also instructs that “the first readily provable violation of 18 U.S.C. § 924(c) shall be charged and proved” in “all but exception cases” and that the second such violation shall be charged and proved in any cases involving “three or more readily provable violations . . . in which the predicate offenses are crimes of violence.” \textit{Id.}}
\end{quote}
Having identified the “allocation of prosecutorial resources” as the only reason for forgoing sentencing enhancements, the Ashcroft Memo provides little guidance on how prosecutors should decide which defendants should have their sentences increased and which should not. Instead, prosecutors are referred to the general policies governing plea agreements. In addition, the Ashcroft Memo also contains specific instructions on how to implement this policy with respect to the two main sentencing enhancements. With respect to repeat drug offenders, prosecutors are instructed to give “particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.” With respect to the sentencing enhancements for the use of a gun, prosecutors’ ability to forgo the charge is even further constrained, as they are instructed that they must bring the charge, if “readily provable,” in “all but extraordinary cases.”

Thus, although Ashcroft Memo does not require sentencing enhancements in all possible cases, the clear Department of Justice policy is that the enhancements are “strongly encouraged” and should be sought.

---

183 Ashcroft Charging Memo, supra note 135. The Memo notes that the authorization to forego the filing of a sentencing enhancement “must be written or otherwise documented and may be granted only after careful consideration of the factors set forth in Section 9-27.420 of the United States Attorneys’ Manual.” Id. That section of the Manual instructs prosecutors to consider:

- The defendant's willingness to cooperate in the investigation or prosecution of others;
- The defendant's history with respect to criminal activity;
- The nature and seriousness of the offenses or offenses charged;
- The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;
- The desirability of prompt and certain disposition of the case;
- The likelihood of obtaining a conviction at trial;
- The probable effect on witnesses;
- The probable sentence or other consequences if the defendant is convicted;
- The public interest in having the case tried rather than disposed of by a guilty plea;
- The expense of trial and appeal;
- The need to avoid delay in the disposition of other pending cases; and
- The effect upon the victim's right to restitution.


184 Ashcroft Charging Memo, supra note 135.

185 Id. Specifically, prosecutors are instructed that “the first readily provable violation of 18 U.S.C. § 924(c) [which will add between five and ten years to the sentence] shall be charged and pursued” in “all but extraordinary cases.” Id. In addition, prosecutors are instruct that they must, “in all but exceptional cases,” charge a second § 924(c) count (which will add an additional twenty-five years to the sentence).Id. “In cases involving three or more readily provable violations of 18 U.S.C. § 924(c) in which the predicate offenses are crimes of violence.” Id.
whenever practical limitations allow. And, even if prosecutors have limited discretion to choose whether to charge sentencing enhancements – albeit for reasons of efficiency not justice – they are (or were) exercising that discretion within a system that regularly discouraged them from thinking about sentencing justice.

Moreover, to the extent that prosecutors do exercise discretion to forego sentencing enhancements, it is likely that they do so primarily as a way to manage their dockets. Indeed, there is good reason to believe that prosecutors in the field may be significantly more parsimonious with sentencing enhancements than the Ashcroft Memo would suggest, but not for any principled reasons for sentencing justice. Instead, prosecutors may use the threat of a sentencing enhancement to induce an early plea. One former federal prosecutor has described his experience with an “unwritten policy” that repeat drug offender enhancements should “never” be filed against defendants who timely pleaded guilty but that they should “always” be filed against defendants who went to trial. Other studies have shown


187 Stephanos Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 YALE L.J. 1097, 1184 n.342 (2001). Having served as an Assistant United States Attorney in the same office as Bibas (the Southern District of New York) during some of the same time period, I can attest to the accuracy of his description. Although both Bibas and I served as federal prosecutors before the Ashcroft Charging Memo was issued, there is good reason to think that the memo did little to change office practice. Shortly after the Ashcroft Charging Memo was issued, Southern District of New York U.S. Attorney David Kelley remarked that the memo was “a continuation of what was already in place in D.O.J. and what was already in place in the S.D.N.Y.,” and thus “the defense bar should not expect that the memo will lead to any changes in practices in the S.D.N.Y.” Albert, supra note170, at 23 (quoting M. Peerce, Focus On: The S.D.N.Y.’s Interim US Attorney, Federal Bar Council News, Vol. XI, No. 1 (February 2004), at 7). Even before the Ashcroft Charging Memo was issued, the use of sentencing enhancements as leverage in plea discussions was forbidden by Department of Justice policy going back at least to the Thornburgh Memo in 1989. See Thornburgh Memo, supra note 172 (“Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant’s conduct.”). That prosecutors in the field might not comply with Department of Justice policy directives is hardly surprising. See Marc L. Miller, Domination & Dissatisfaction: Prosecutors As Sentencers, 56 STAN L. REV. 1211, 1212 (2004) (discussing the “ongoing and visible tension between official policy at the Department of Justice and the activities of line prosecutors in the field”). Indeed, the very tone of the Ashcroft Charging Memo can be said to betray a sense of frustration that prosecutors in the field do not always follow the rules laid down by policy makers in
that § 924(c) charges are filed far less often than official DOJ policy would suggest.\textsuperscript{188}

Whether sentencing enhancements are used as leverage to extract pleas or used routinely in an effort to obtain the "most serious" sentence, the result can distort any notion of sentencing justice.\textsuperscript{189} Defendants with vastly different levels of culpability can receive essentially identical sentences. Defendants with essentially identical levels of culpability can receive vastly different sentences. And, even putting questions of uniformity and disparity aside, the indiscriminate use of sentencing enhancements can lead to extraordinarily harsh sentences that are grossly out of proportion to the defendant's conduct and difficult to justify under any principled theory of punishment.

IV. THE ADVISORY GUIDELINES ERA: PROSECUTORS AS PUNISHMENT THEORISTS

As Parts II and III of this article have demonstrated, prosecutors in both the pre-Guidelines era and mandatory Guidelines era were able to approach sentencing without much regard for the purposes of punishment. In the pre-Guidelines era, prosecutors had little power to affect the sentence and therefore bore little responsibility. In the Guidelines era, prosecutors many times found themselves in a similar situation with little power to affect the "real offense" sentence. When prosecutors did address sentencing, it was usually as technocrats, arguing over the minutia of Guidelines calculations, not the broad questions of harm, blame, deterrence, and justice. And even

\textsuperscript{188} See United States Sentencing Commission, Report of the Firearms Policy Team, \textit{Sentencing for the Possession or Use of Firearms During a Crime} 16 (2000) ("There is considerable evidence, spanning almost ten years and using different research methods, that section 924(c) violations are not charged and pressed in a significant number of cases that appear to legally qualify for them.").

\textsuperscript{189} Michael O'Hear has recently questioned the constitutionality of using the threat of additional charges as plea bargaining leverage. See Michael M. O'Hear, \textit{The End of Bordenkircher: Extending the Logic of Apprendi to Plea Bargaining}, 84 WASH. U.L. REV. ___ (2007) (arguing that the practice, approved by three decades ago, offends the vision of the Due Process Clause that underlies recent Supreme Court sentencing jurisprudence).
when prosecutors did wield significant sentencing power, as when deciding whether to charge sentencing enhancements, there is little evidence that either official policy or actual practice gave much attention to the principles of punishment. In the *Booker*-era, however, this prosecutorial indifference to punishment theory is, by necessity, changing.

A. *The Booker Rollback*

For over a decade after the Supreme Court first gave its blessing to the Sentencing Commission, the constitutionality of the mandatory Guidelines was largely unquestioned. Then, in 2000, the Supreme Court unexpectedly began constitutionalizing sentencing procedures – a process that eventually led it, five years later, to reject the basic structure of the mandatory Guidelines in *United States v. Booker*.

The road to *Booker* began in 2000 with *Apprendi v. New Jersey*, in which the Court struck down a New Jersey hate crimes statute that permitted a court to increase a defendant’s sentence above the otherwise applicable statutory maximum if the sentencing judge found based on a preponderance of the evidence that the offense involves racial animus. The court’s holding was based on its view that any fact (other than the fact of a prior conviction) that permits the imposition of a sentence above the otherwise applicable statutory maximum “must be submitted to a jury, and proved beyond a reasonable doubt.” Although constitutional concerns

---

190 See Mistretta v. U.S., 488 U.S. 361 (1989). The primary Constitutional challenge in Mistretta was to the creation and composition of the Commission and to the Congressional delegation of authority to it. See id. at 412 (“We conclude that in creating the Sentencing Commission – an unusual hybrid in structure and authority – Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches.”).

191 In the decade after Mistretta, the Court did address various Equal Protection and Due Process challenges to particular aspects of the Guidelines, see, e.g., United States v. Watts, 519 U.S. 148 (1991) (rejecting a Due Process challenge to the consideration of acquitted conduct), but not to the Guidelines as a whole.


194 Id. at 490.
about judicial fact finding at sentencing had been expressed by the Court in two cases decided in the late 1990s, most of the criminal justice world was surprised by *Apprendi*’s “watershed” ruling. Read broadly, *Apprendi*’s holding could call into question two decades of sentencing reform.

Immediately following *Apprendi*, however, it was not clear that the decision imperiled the mandatory Guidelines. *Apprendi*, after all, concerned only judicial fact finding that increased sentences beyond statutory maxima, and the sentencing ranges established by the Guidelines all fall within below the statutory maxima. Indeed, for four years, most lower courts interpreted *Apprendi* in a narrow way that preserved the mandatory Guidelines system. Then, in 2004, the Supreme Court followed the *Apprendi* “watershed” with “earthquake” of *Blakely v. Washington*.

---

195 The concern about judicial fact finding at sentencing reflected in *Apprendi* first appeared in *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998) (holding 5-4 over a strong dissent that a statutory maximum sentence could be increased based on a judicial finding of prior criminal history), and in *Jones v. U.S.*, 526 U.S. 227 (1999) (suggesting that *Almendarez-Torres* created only a limited exception for prior convictions).

196 Writing in dissent, Justice O’Connor noted that *Apprendi*’s holding “will surely be remembered as a watershed change in constitutional law.” *Apprendi*, 533 U.S. at 524 (O’Connor, J. dissenting). See Berman, supra note 192, at 670 (“But then, all of a sudden, almost as if a mysterious fin-de-siecle doctrinal light-switch was flipped, the Supreme Court’s sentencing jurisprudence took a remarkable turn and the Court started to express considerable concerns with traditionally lax sentencing procedures.”).

197 See Berman, supra note 192, at 672 (describing *Apprendi* as a “shocking decision” because it “cast constitutional doubt on many sentencing statutes and guidelines enacted during the modern sentencing reform movement”).

198 Moreover, *Apprendi* did not call into question either of the two main sentencing enhancements. Enhancements for prior felony drug offense fell within the *Almendarez-Torres* exception for prior convictions, and enhancements for the use of a gun under 18 U.S.C. § 924(c) were charged as a separate crimes and so subjected to jury fact finding. See id. at 672.

199 See generally Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003); Berman, supra note 192, at 673 (“Lower federal and state courts typically interpreted *Apprendi* narrowly in order to preserve, as much as possible, existing sentencing structures that relied on judicial fact-finding, and legislatures did not feel compelled to alter existing sentencing systems or criminal codes in light of *Apprendi*.”).

In Blakely, the Court held that Apprendi’s requirement of jury fact finding extended to “all facts legally essential to the punishment.”\textsuperscript{201} Blakely’s sentence for kidnapping under the Washington State sentencing guidelines had been enhanced based on the sentencing judge’s finding that the offense had involved “deliberate cruelty.” Because the Washington Sentencing Guidelines were mandatory, this finding was “legally essential” to the sentence, which rendered the process unconstitutional.

Blakely’s application to the federal Sentencing Guidelines was immediately apparent. Under the mandatory federal guidelines, most of the facts that went into a guidelines calculation were “legally essential” to the sentence. To comply with Blakely, those facts would have to be found by a jury beyond a reasonable doubt – a task that is practically impossible given the detail and complexity in the federal guidelines. Thus, when the Supreme Court agreed to review the constitutionality of federal sentencing in United States v. Booker, most participants in the sentencing system expected the Court to declare the federal Sentencing Guidelines unconstitutional, sending Congress back to the sentencing reform drawing board for the first time in twenty years.\textsuperscript{202} Indeed, the attention of many commentators had already turned to a variety of possible “Blakely fixes.”\textsuperscript{203}

When Booker was decided in January 2005, the result surprised the experts. As expected, the Court ruled that the federal Sentencing Guidelines were unconstitutional under Blakely.\textsuperscript{204} Writing for a five-justice majority that included Justices Scalia, Souter, Thomas, and Ginsburg, Justice Stevens affirmed the Court’s holding in Apprendi: “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.” Dissenting from this “constitutional opinion,” Justice

\textsuperscript{201} Blakely, 542 U.S. at 313.

\textsuperscript{202} See Berman, supra note 192, at 675 (“[N]early all observers were prepared for the Court to declare Blakely applicable to the federal system and thereby find unconstitutional the federal sentencing guidelines’ reliance on judicial fact-finding at sentencing.”).


\textsuperscript{204} See United States v. Booker, 543 U.S. 220 (2005) (Stevens, J. announcing the opinion of the Court, with Scalia, Souter, Thomas, and Ginsburg, J.J., joining).
Breyer, joined by Chief Justice Rehnquist and Justices Kennedy and O’Connor, argued both that \textit{Blakely} was wrongly decided and that it need not apply to the Sentencing Guidelines.\textsuperscript{205} This much of \textit{Booker} was predictable.

But then, a different group of five justices – the four dissenters from the merits opinion plus Justice Ginsburg – announced the remedy.\textsuperscript{206} Writing for this group, Justice Breyer, against all odds, managed to preserve the Guidelines in the face of \textit{Apprendi} and \textit{Blakely}.\textsuperscript{207} He did so by excising two sections of the Sentencing Reform Act: (1) the provision that required judges to impose a sentence within the Guidelines range, unless the court found grounds for a departure;\textsuperscript{208} and (2) the provision that established standards of review on appeal, including \textit{de novo} review of departures from the otherwise mandatory Guidelines range.\textsuperscript{209} With this minor surgery, Justice Breyer preserved the vast body of Guidelines law and Guidelines-era practice. The Guidelines themselves are left intact; so too is the procedure for judicial determination of Guidelines facts and Guidelines sentencing ranges. The major difference is that the Guidelines sentencing range is now “advisory” rather than mandatory, as originally required by 18 U.S.C. § 3553(b).

The elimination of § 3553(b) has given new life to § 3553(a). With the Guidelines no longer mandatory, judges are now free – indeed, required – to sentence pursuant to the principles set forth in § 3553(a). Thus, judges must follow the basic principle of parsimony,\textsuperscript{210} and then must consider the traditional purposes of punishment (retribution,\textsuperscript{211} deterrence,\textsuperscript{212}

\textsuperscript{205} \textit{Booker}, 543 U.S. at 226-27 (Breyer, dissenting).
\textsuperscript{206} \textit{Booker}, 543 U.S. at 245-68 (Breyer, J., announcing opinion of the Court, with Rehnquist, C.J. & O’Connor, Kennedy & Ginsburg, JJ., joining).
\textsuperscript{207} Justice Breyer’s role in preserving the Guidelines came as no surprise, as he was both an important Senate aide during the drafting of the Sentencing Reform Act and a Commissioner during the drafting of the Guidelines. \textit{See STITH & CABRANES, supra note 51, at 49-50.}
\textsuperscript{208} \textit{See} 18 U.S.C. § 3553(b) (2003); \textit{see also supra} notes 60-61 and accompanying text.
\textsuperscript{210} \textit{See} 18 U.S.C. § 3553(a) (2003) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection ... ”).
\textsuperscript{211} \textit{See} 18 U.S.C. § 3553(a)(2)(A) (2003) (requiring sentencing judges to consider the need “to provide just punishment for the offense”).
incapacitation\textsuperscript{213}, and rehabilitation\textsuperscript{214}), along with the need for uniformity\textsuperscript{215} and restitution.\textsuperscript{216} Even with this new-found freedom for sentencing judges, the Guidelines remain alive and well because § 3553(a) also requires judges to consider the sentencing range established by the Guidelines and the policy statements issued by the Sentencing Commission.\textsuperscript{217}

The Guidelines’ continuing vitality was ensured by the second part of the \textit{Booker} remedy – a new appellate standard of review for sentences. Before \textit{Booker}, appellate courts reviewed sentences only to determine whether they complied with the Guidelines.\textsuperscript{218} With the Guidelines no longer mandatory, this appellate standard no longer made sense. So, Justice Breyer replaced it with a “reasonableness” standard, which he found implicit in the language, structure, and policy of the Sentencing Reform Act.\textsuperscript{219} This appellate review, while deferential, ensures that the Guidelines remain the starting point\textsuperscript{220} for most sentencing determinations, because sentences within the now-advisory Guidelines range will almost always survive reasonableness review.\textsuperscript{221}

\begin{itemize}
\item \textsuperscript{212} See 18 U.S.C. § 3553(a)(2)(B) (2003) (requiring sentencing judges to consider the need “to afford adequate deterrence to criminal conduct”).
\item \textsuperscript{213} See 18 U.S.C. § 3553(a)(2)(C) (2003) (requiring sentencing judges to consider the need “to protect the public from further crimes of the defendant”).
\item \textsuperscript{214} See 18 U.S.C. § 3553(a)(2)(D) (2003) (requiring sentencing judges to consider the need “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).
\item \textsuperscript{215} See 18 U.S.C. § 3553(a)(6) (2003) (requiring sentencing judges to consider the need “to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”).
\item \textsuperscript{216} See 18 U.S.C. § 3553(a)(2)(7) (2003) (requiring sentencing judges to consider the need “to provide restitution to any victims of the offense”).
\item \textsuperscript{217} See 18 U.S.C. § 3742(e) (2003).
\item \textsuperscript{218} Sentences were reviewed for errors in the Guidelines calculation or for unauthorized departures from the Guidelines range. See 18 U.S.C. § 3742(e) (2003).
\item \textsuperscript{219} See United States v. Booker, 543 U.S., at 260-61 (noting that the Court may “infer appropriate review standards from related statutory language, the structure of the statute, and the ‘sound administration of justice’” and that “in this instance those factors ... imply a practical standard of review already familiar to appellate courts: review for ‘unreasonable[ness]’”).
\item \textsuperscript{220} See United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006) (stating that “[t]he Guidelines continue to be the starting point for district courts” when imposing terms of imprisonment) (internal quotation marks omitted).
\item \textsuperscript{221} The clearest evidence of the Guidelines continued vitality is in \textit{Rita} v. \textit{U.S.}, where the Court held that a circuit could adopt a “presumption of reasonableness” for sentences within the advisory
\end{itemize}
Thus, the end result of Booker — advisory Guidelines and reasonableness review — is a far cry from the “revolution” that many commentators saw presaged in Blakely. Instead of a revolution, Booker represents a modest roll back of the sentencing reforms of the past twenty years. The now-advisory Guidelines are still central to sentencing determinations and, indeed, most sentences remain within the advisory range. Nevertheless, the essence of the Booker remedy remains: judges are now required to consider not just the Sentencing Guidelines, but also the traditional purposes of punishment. In other words, judges are now required to consider the ultimate justice of the sentence.

This change in the judicial role at sentencing has important implications for prosecutorial engagement with sentencing justice.

B. Seeking “Reasonableness” at Sentencing

Once Booker freed judges to shape sentences in light of the principles of punishment, prosecutors had two options. First, they could continue their

Guidelines range. 126 S. Ct. 2456, 2462 (2007). Even in the Second Circuit, which has not adopted a “presumption of reasonableness,” the court has recognized that “in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” United States v. Fernandez, 443 F.3d 19, 28 (2d Cir. 2006); see also U. S. v. Mykytiuk, 415 F.3d 606, 608 (7th Cir.2005) (“While we fully expect that it will be a rare Guidelines sentence that is unreasonable, the [Supreme] Court's charge that we measure each defendant's sentence against the factors set forth in § 3553(a) requires the door to be left open for this possibility.”).

222 See, e.g., Blakely v. Washington, 542 U.S. 296, 326 (2004) (O'Connor, J., dissenting) (“What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy.”); Jack Nordby, Windfall Justice: Sentences at the Mercy of Hypertechnicality, 31 WM. MITCHELL L. REV. 407, 409 (2004) (“Blakely presages a revolution in sentencing; it is the epitaph to the guidelines system as we know it.”); Bowman, supra note 196, at 259 (decrying “the shambles Blakely has created” and expressing fear that the Court will “complete the Blakely revolution by making structured sentencing constitutionally impossible”).

223 The latest statistics from the Sentencing Commission indicate that only approximately 10% of all sentences vary from the advisory Guidelines range as a result of Booker. See United States Sentencing Commission, Preliminary Quarterly Data Report (June 30, 2007), available at http://www.ussc.gov/sc_cases/Quarter_Report_3rd_07.pdf (noting that 61% of all sentences fall within the advisory Guidelines range, while an additional 28% fall within departures – most initiated by the Government – that pre-date Booker). In its brief in Rita, the Department of Justice cited figures suggesting that Booker has led to a 4% increase in sentences outside the Guidelines range. See Brief for the United States, United States v. Rita, 2007 WL 186288 (2007) (No. 06-5754).
practice of not taking a position at sentencing, other than to argue for a
correct calculation of the Guidelines range. In other words, prosecutors
could advocate for a particular Guidelines calculation, but then could stand
mute as the judge considered the other purposes of punishment: retribution,
deterrence, incapacitation, rehabilitation, uniformity, and restitution.

Not surprisingly, prosecutors have not chosen this option. During the
past two decades, prosecutors have grown accustomed to the certainty – and
the severity – of the sentencing Guidelines. They have also grown
accustomed to the power that the mandatory Guidelines gave them.
Whether by proving a loss amount, or proving a drug quantity, or presenting
evidence about a wide variety of Guidelines factors, prosecutors played a
large role in determining the sentence. Moreover, at the institutional level,
Department of Justice policy makers in Washington have become devoted
to the ideal of “uniformity” – no doubt in part as a way to ensure consistent
severity.224 The other option – and the one chosen by the Department of
Justice – is for prosecutors to become sentencing activists, abandoning their
traditional reluctance to advocate for particular sentences and instead
arguing the principles of punishment as set forth in § 3553(a).

Just days after Booker was decided, Deputy Attorney General James
Comey issued a memo to all federal prosecutors outlining official policy for
sentencing under the advisory Guidelines. The memo began with a nod to
the principles of punishment:

First, we must do everything in our power to ensure that
sentences carry out the fundamental purposes of sentencing.
Those purposes, as articulated by Congress in the Sentencing
Reform Act, are to reflect the seriousness of the offense, to
promote respect for the law, to

---

224 See Miller, supra note 6, at 1241-1252 (describing the legislative history of the Feeney
Amendment, which was created and promoted by the Department of Justice as a way to reduce
downward departures); Letter from Jamie E. Brown, Acting Ass’t At’y Gen’l, U.S. Dep’t of Justice
Office of Legislative Affairs to Orrin G. Hatch, Chairman, U.S. Senate Committee on the Judiciary
“consistency, predictability, and toughness” though the Feeney Amendment) (emphasis added);
Michael M. O’Hear, The Original Intent of Uniformity in Federal Sentencing, 75 U. CIN. L. REV. __,__
(2007) (“Proponents of the Feeney Amendment made no secret of their single, overriding
objective: a reduction in rates of downward departure.”).
afford deterrence, to protect the public, and to offer opportunities for rehabilitation to the defendant. But then, the memo quickly turned to the main principles – uniformity and proportionality – that underlie the Guidelines:

Second, we must take all steps necessary to ensure adherence to the Sentencing Guidelines. One of the fundamental imperatives of the federal sentencing system is to avoid unwarranted disparity among similarly situated defendants. The Guidelines have helped to ensure consistent, fair, determinate and proportional punishment. They have also contributed to historic declines in crime. We must do our part to ensure that the Guidelines continue to set the standard for federal sentencing.

To implement these principles, the Comey Memo instructs federal prosecutors that, in all but extraordinary cases, they must actively seek sentences within the advisory Guidelines range and must oppose defense requests for sentences outside that range:

Federal prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases. Under the Guidelines, departures are reserved for rare cases involving circumstances that were not contemplated by the Sentencing Commission. Accordingly, federal prosecutors must obtain supervisory authorization to recommend or stipulate to a sentence outside the appropriate Guidelines range or to refrain from objecting to a defendant's request for such a sentence.

At first blush, this insistence on adherence to non-binding Guidelines seems the exact opposite of prosecutorial engagement with sentencing justice. By insisting on adherence to Guidelines sentences, the Comey

225 Memorandum from Deputy Attorney General James B. Comey to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing (January 28, 2005) (hereinafter Comey Memo).
226 Id. at 1.
227 Id. at 2.
Memo seems to suggest that prosecutors should ignore the other principles set forth in § 3553(a).

Nevertheless, to comply with this directive, prosecutors must engage with the traditional purposes of sentencing – if only to oppose defense requests for sentences below the advisory Guidelines range. Defendants now routinely seek sentences below the advisory Guidelines range. To oppose those requests – to “actively seek the sentence within the Guidelines range” – prosecutors must argue that the Guidelines’ sentence is consistent with the purposes of punishment and the below-Guidelines sentence is not. In other words, prosecutors cannot simply argue the correctness of the Guidelines calculation; they must also argue the justness of the Guidelines sentence. And, they must do so not only at sentencing, but also on appeal when the appellate court will review the “reasonableness” of the sentence.

Engaging with sentencing justice – or, to use the post-Booker term, “substantive reasonableness” – is not a comfortable or familiar role for prosecutors. Arguing for a particular Guidelines calculation is much easier: it involves proving facts and arguing law. But now, prosecutors cannot simply argue facts and law; they must also defend the substantive justice of the result. And it will not do to argue that the below-Guidelines sentence is unjust simply because it is below the Guidelines. The essential holding of Booker is that the Guidelines are not mandatory. So, while the Guidelines can be the start of the sentencing analysis, they cannot be the end. The ultimate question for the judge, and by extension for the prosecutor-as-

---

228 See, e.g., Brief for the United States, Gall v. U.S., 2007 WL 2406805, at 44-50 (No. 06-7949) (arguing that a probationary sentence received by narcotics offender was unreasonable).

229 In reviewing for reasonableness, many courts have distinguished between “procedural reasonableness” and “substantive reasonableness.” For example, in the Second Circuit, reasonableness review involves a “two-pronged analytical process”:

   1) procedural reasonableness, in which the court will look to see if the district court identified the appropriate Guidelines range, treated the Guidelines as advisory, and considered the Guidelines alongside the other § 3553(a) factors;

   2) substantive reasonableness, in which the court will consider the length of the sentence imposed in light of the statutory factors.

advocate, is the whether the sentence comports with the principles of punishment.

As a matter of sentencing policy, the system of advisory Guidelines established by *Booker* has its obvious appeal. On the most superficial level, if a Guidelines sentence does not comport with the principles of punishment, it should not be imposed; if it is imposed, it should be reversed on appeal as “substantively unreasonable.” Of course, increased judicial discretion creates a risk of increased unwarranted disparity. Nevertheless, given the powerful anchor provided by the Guidelines, it is unlikely that such disparities will become a serious problem.

My interest, however, is not in defending *Booker* or the advisory Guidelines. Instead, my interest is in *Booker’s* potential to change the way in which federal prosecutors think about sentencing justice. Prosecutors’ new role as advocates for sentencing justice is, in my view, enormously positive – even if it will have little practical effect on actual sentences. I do not expect that federal prosecutors will suddenly become more lenient simply because they must justify Guidelines sentences. Department of Justice policy requires them to advocate for sentences within the Guidelines and most prosecutors are quite comfortable doing so. Nevertheless, it is possible that over time prosecutors will grow accustomed to their new role as punishment theorists, will grow accustomed to thinking about the purposes of punishment, will grow accustomed to talking about and advocating for the purposes of punishment, and will grow accustomed to being responsible for the righteousness of the sentences that they cause to be imposed.

C. *Seeking “Reasonableness” in Charging*

So what? Why should it matter that prosecutors couch their arguments not just in the language of offense levels and criminal history categories, but also in the language of deterrence and retribution, harm and blame? Or, to put it differently, why not leave sentencing justice to the judge and the defense attorney?

In a true real offense system, prosecutorial passivity about the “substantive reasonableness” of sentences might make sense. In a true real
offense system, decisions about the purposes of punishment could be left to
the sentencing judge, as guided by the policy determinations of the
Sentencing Commission. In a true real offense system, it might make sense
to say, as the Department of Justice does, that “[s]entencing in Federal
criminal cases is primarily the function and responsibility of the court.”230

But we don’t have a true real offense system. Instead, for many crimes,
mandatory minimums and sentencing enhancements create a “charge
offense” system in which prosecutorial decisions effectively determine the
sentence. The promise of the Sentencing Guidelines – uniformity,
proportionality, and consistency – is rendered false when a prosecutor can
double or triple already lengthy sentences simply by filing additional
charges.231 And the goal of sentencing justice becomes more elusive when a
sentence is determined not through the expert analysis of the Sentenc-
ing Commission and the disinterested discretion of the sentencing judge, but
rather through the decisions of a prosecutor who is neither encouraged nor
equipped to consider questions of sentencing justice.

The engagement with sentencing justice thrust on prosecutors by Booker
is helpful at the sentencing stage, but not essential. At sentencing, the judge
is both required and perfectly able to consider the principles of punishment
and to sentence accordingly. But, in a limited number of cases – typically
those involving guns or those involving serious drug offenses where the
defendant has a prior drug conviction – the prosecutor serves as the
sentencer. In those cases, it is their charging decisions – particularly their
use of sentencing enhancements – that determine that sentence. Thus, in
these cases, it is at charging that prosecutorial engagement with the
purposes of punishment is so important. And it is here that prosecutors’
new role as punishment theorists can make the most difference.

As the system stands now, prosecutors effectively impose the sentence
by choosing to file (or choosing not to file) sentencing enhancements. Yet,
those prosecutors are neither required nor encouraged to consider explicitly
the justice of the resulting sentence. Under official Department of Justice
policy, sentencing enhancements are “strongly encouraged” and may be

231 See supra notes 143-163 and accompanying text.
foregone only for reasons of efficiency. Thus, while prosecutors undoubtedly exercise their discretion in deciding whether to file sentencing enhancements, the main consideration is likely to be docket management. In other words, sentencing enhancements are likely to be used as a “trial penalty” to induce defendants to plead guilty. Indeed, given the longstanding prosecutorial disengagement from sentencing justice, prosecutors may find themselves ill equipped to consider sentencing justice even if they wanted to.

As a result, a defendant who is convicted of a drug offense could have his sentence doubled from ten years to twenty years without anyone explicitly considering the justice of that sentence. A defendant who commits two armed robberies without inflicting any injuries could receive a sentence in excess of thirty-five years without anyone explicitly considering the justice of that sentence.

It is not my position that sentencing enhancements should never be used. Congress undoubtedly intended and expected them to be used. The question is how prosecutors should decide which defendants should have their sentences enhanced. Booker, by forcing prosecutors to engage with the basic principles of punishment, now provides a framework for prosecutors to think about the justice of sentencing enhancements. More particularly, appellate review of sentences for reasonableness will, over time, add substance to that framework. And, this framework can lead to a simple rule: prosecutors should file charges that trump the Guidelines sentence only when the sentence determined under the Guidelines would be “unreasonable” under Booker. In other words, prosecutors should file a sentencing enhancement only when the particular circumstances of the case make an unenhanced sentence inconsistent with the principles of punishment as set forth in § 3553(a).232

To be sure, my suggested approach – tying sentencing enhancements to “reasonableness” under Booker – is flatly inconsistent with current

---

232 In proposing a “rule,” I am suggesting a non-binding prosecutorial policy. While such policies do not create enforceable rights, they can still carry numerous salutary benefits, both internally and externally. See generally, Simons, supra note 25, at 956-63 (summarizing the benefits from non-binding charging guidelines).
Department of Justice Policy as outlined in the Ashcroft Memo. My suggested approach, however, is consistent with the Department’s repeated defense of the Sentencing Guidelines in the face of increased judicial discretion to impose non-Guidelines sentences. For example, in the more recent Comey Memo, the Department announced that prosecutors must “do everything in [their] power to ensure that sentences carry out the fundamental purposes of sentencing” as articulated in § 3553(a), but must do so by “actively seek[ing] sentences within the range established by the Sentencing Guidelines in all but extraordinary cases.”

The clear implication from these dual directives is that the Guidelines sentence, absent extraordinary circumstances, is the sentence that comports with the principles of punishment.

The Department of Justice has since made this argument more explicit. In its brief in *Rita v. United States*, the first significant post-*Booker* sentencing case to be decided by the Supreme Court, the Department argued that Guidelines sentences could be considered “presumptively reasonable” because the Guidelines were designed to – and generally do – effectuate the principles of punishment in § 3553(a). In particular, the Department argued that “a sentence within the Guidelines range” “best satisf[y] the considerations in 18 U.S.C. 3553(a)” in “all but the most unusual cases” for “four related reasons:”

the Guidelines integrate the factors in Section 3553(a); they reflect the Sentencing Commission's extensive consideration of past practice and sound policy, including Congress's directions regarding appropriate sentences for certain crimes; they are a critical tool for achieving Congress's goal of sentencing uniformity; and, finally, a Guidelines sentence reflects a joint determination by the sentencing judge and the Sentencing

---

233 Comey Memo, *supra* note 225, at 1. Paraphrasing § 3553(a), the Comey Memo noted that the fundamental purposes of sentencing, “as articulated by Congress in the Sentencing Reform Act, are to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment, to afford deterrence, to protect the public, and to offer opportunities for rehabilitation to the defendant.” *Id.*
Commission that a sentence within the Guidelines range complies with the factors in Section 3553(a).\footnote{Brief for the United States, Rita v. United States., 2007 WL 186288, at 15 (2007) (No. 06-5754.). The Department’s position was eventually adopted by the Supreme Court. See Rita, 127 S.Ct. 2456, 2458 (2007) (holding that the Guidelines “seek to embody the §3553(a) considerations, both in principle and in practice” and “reflect a rough approximation of sentences that might achieve §3553(a)’s objectives”).}

In other words, the Department of Justice maintains that, in all but the most unusual cases, the Guidelines sentence will comport with the principles of punishment. Sentences imposed as a result of sentencing enhancements, however, are usually significantly higher than Guidelines sentences. If the Guidelines sentence is reasonable and satisfies the principles of punishment in all but the most “unusual” or “extraordinary” cases, then the Guidelines sentence should be doubled or tripled through the use of sentencing enhancements only in the “unusual” or “extraordinary” case where the Guidelines sentence is “unreasonable” under \textit{Booker}.\footnote{Of course, simply because a Guidelines sentence is “reasonable” in a particular case, it does not automatically follow that a non-Guidelines sentence in that case necessarily will be “unreasonable.” See Rita v. United States, 127 S. Ct. 2456, 2467 (2007) (stating that appellate courts may not presume that any variance from the Guidelines is unreasonable).Nevertheless, given that sentencing enhancements increase sentences so dramatically – both in absolute terms and relative terms – it is will be the rare case in which both the Guidelines sentence and the enhanced sentence can be considered equally reasonable.}

\textit{Booker} not only established a standard (“reasonableness”), but it also established a procedure (“appellate review for reasonableness”) that is now regularly invoked. Thus, prosecutors must routinely decide whether to appeal a sentence as unreasonable.\footnote{Comey Memo, supra note 225.} Even more frequently, prosecutors...
must defend a sentence as reasonable in the face of a defense appeal. And, as appellate courts decide more reasonableness cases, those opinions will give more content to the *Booker* standard. In other words, in the post-*Booker* era, prosecutors will have both extensive practice and appellate guidance in determining whether sentences are reasonable. It will be both straightforward and familiar for them to apply the same process in determining whether a sentencing enhancement results in a reasonable sentence.

I do not mean to suggest that determining sentencing reasonableness is easy; but the difficulty of the determination does not make it any less essential to sentencing justice. Moreover, in a case involving a sentencing enhancement, only the prosecutor is in a position to make the determination. In most cases, once the sentencing enhancement is imposed, neither the sentencing judge nor the appellate court has any authority to pass on the reasonableness of the sentence, no matter how high it is. In other words, if the prosecutor does not ask the question – “Is this sentence just?” – no one will. By applying the *Booker* “reasonableness” standard to sentencing enhancements, prosecutors can ensure that charging decisions are based not only on considerations prosecutorial efficiency, but also on considerations sentencing justice. To make that determination, prosecutors will have to become punishment theorists of a sort. They will have to engage with the difficult question of whether the basic principles of punishment – retribution, deterrence, incapacitation, and rehabilitation – require that a defendant receive a sentence above the normal Guidelines range.

V. CONCLUSION

Although it was not designed by Congress, the system of guided discretion that now governs federal sentencing is quite consistent with punishment theory. The Sentencing Guidelines establish an anchor that ensures general consistency and widespread uniformity, while judicial discretion allows individualization of sentences by a neutral decision maker pursuant to the generally accepted principles of punishment. Sentencing enhancements – and mandatory minimum sentences in general – are fundamentally inconsistent with this system. Why not, then, forego sentencing enhancement altogether? In other words, should prosecutors
simply refuse to charge sentencing enhancements, and instead argue for upward variances? That way, prosecutors could still advocate for the enhanced sentence, but the ultimate decision could be made by a neutral arbiter. While such prosecutorial forbearance has some undeniable appeal, expecting it is unrealistic. Sentencing enhancements and mandatory minimum sentences give prosecutor undeniable power. It is simply too much to expect that prosecutors will voluntarily forgo the exercise of this significant power. More importantly, if prosecutors categorically refused to exercise their discretion to charge mandatory minimums and sentencing enhancement, they would be frustrating Congessional intent. By enacting mandatory minimums and sentencing enhancements, Congress expressed its distrust of judicial discretion. In other words, Congress specifically chose to empower prosecutors to trump judicial sentencing determinations. Presumably, Congress expected that prosecutors would exercise this discretion responsibly. My proposal – for prosecutors to voluntarily limit their sentencing discretion pursuant to the principles of punishment set forth by Congress – is both politically feasible and consistent with the division of sentencing responsibility intended by Congress.

Moreover, our current system of advisory guidelines has made the responsible exercise of prosecutorial sentencing discretion all the more important. Because judges now have discretion to impose sentences below the guidelines range, prosecutors will be under increasing pressure to use their charging power to prevent below-guidelines sentences in high-profile cases. Indeed, in its most recent pronouncements regarding post-Booker sentencing, the Supreme Court has made clear that judges have broad discretion to impose below-guidelines sentences. As more sentencing judges some to understand – and appreciate – the breadth of the discretion granted to them by Booker, pressure will only increase on prosecutors to

---

237 In United States v. Kimbrough, 552 U.S. __ (2007), the court approved a below-guidelines sentence for a defendant convicted of a crack offense, based on the sentencing judge’s disagreement with the ratio between crack sentences and cocaine sentences under the advisory guidelines, even though that ratio was explicitly set by Congress. Similarly, in United States v. Gall, 552 U.S. __ (2007), the court approved a below-guidelines sentence based on the judge’s evaluation of a variety of individual characteristics – including the defendant’s age, immaturity, education, and post-offense conduct – that are typically irrelevant under the Sentencing Guidelines.
bring more charges that carry minimum penalties, as a way to counteract “unwarranted” judicial leniency. Moreover, and notwithstanding the steady drumbeat of opposition to mandatory sentences, they are only likely to proliferate in the post-Booker world. When the Sentencing Guidelines were mandatory, Congress could “get tough” on a particular crime simply by mandating changes to the guidelines. Now that the guidelines are advisory, Congress will be increasingly tempted to respond to perceived crime threats (or perceived judicial leniency) with additional mandatory sentences. In a world where mandatory sentences will occupy an increasing role, prosecutorial charging discretion become all the more important. It is thus crucial for sentencing justice that prosecutors develop charging policies that are fair, rational, and consistently based on the principles of punishment.

Their new role as punishment theorists may not be a comfortable one for prosecutors, especially after years of prosecutorial disengagement from sentencing justice. Nevertheless, it is a role that has been thrust on them by Booker. It is also a role they should embrace in their quest to “seek justice.”

---

238 See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (known as the “PROTECT Act”), Pub. L. 108-21, § 401(m) (April 30, 2003) (mandating that the Sentencing Commission make “appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced”).