Sentencing Guideline Law and Practice in a Post-Booker World: Introduction

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Symposium

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Introduction

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Preparing an introduction for a symposium on United States v. Booker1 is a challenge. In its short history, Booker has generated substantial controversy and not just among scholars.2 For example, the political branches of government are considering legislative action to undo Booker.3

Whether Booker will become a benchmark decision is an open question. In the short term, the decision has dominated legal dialogue. Reactions to the decision have included extravagant claims about the meaning of the decision. As Professors Luna and Poulson observe in their article in this symposium, some commentators were “ecstatic” and characterized Booker as “‘a wise and careful decision,’” while others have called the decision a “‘disaster’” risking chaos in the federal criminal justice system.4

Before offering an overview of this symposium, I want to offer a few thoughts about why Booker has caused such shock waves. The starting point for a

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3. See Alberto R. Gonzales, Prepared Remarks of Attorney General Alberto R. Gonzales at the American Bar Association House of Delegates (Aug. 8, 2005), available at http://www.usdoj.gov/ag/speeches/2005/080805agamericanbarassoc.htm (on file with the McGeorge Law Review) (relating his fear that the post-Booker sentencing system “will not be able to sustain the progress [the government has] made and victims may be victimized once again by a system that is intended to protect them”). He goes on to advocate that Congress adopt a minimum sentencing guideline system because “[i]t would preserve the traditional division of responsibility between judges and juries in criminal cases and retain the important function of the United States Sentencing Commission in providing guidelines to the courts regarding sentencing. It would also allow judges some flexibility for extraordinary cases.” Id.; see also Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security Committee of the H. Comm. on the Judiciary, 109th Cong. (Feb. 10, 2005) (prepared testimony of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission) (stating that the Sentencing Commission has been holding hearings and considering different proposals to respond to Booker).

discussion of the case is the odd division within the Court. The case arose from a drug sentence imposed under the Federal Sentencing Guidelines ("Guidelines"). After the jury convicted Booker of possession of cocaine with the intent to distribute, the district court held a sentencing hearing in which it found, by a preponderance of the evidence, that Booker was responsible for distributing a far greater quantity of cocaine than the prosecution had proven to the jury. The court's finding led to a term of imprisonment of almost one hundred months longer than Booker would have received without the additional finding. In Fanfan, the companion case to Booker, the trial court found, in reliance on Blakely v. Washington, that enhancing the defendant's sentence would violate the Sixth Amendment right to have the jury decide all facts that are determinative of the appropriate sentence.

Finding the holding in Booker requires parsing two opinions, with only Justice Ginsburg joining both majority opinions. Justice Stevens wrote what has been called "the merits" opinion. As seemed certain after Blakely, Stevens' majority found that the Guidelines were infirm: "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." Perhaps not surprising in light of his service on the United States Sentencing Commission, Justice Breyer wrote the second majority opinion. Labeled the "remedial" opinion, it severed two subsections of the Sentencing Reform Act and held that those two provisions were invalid. The most important result of invalidating those two sections was to make the Guidelines advisory. And, as agreed to by all nine Justices, a jury does not need to resolve facts in a system in which guidelines are merely advisory.

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7. Id.
10. Id.
11. Id. at 258-61 (invalidating 18 U.S.C. §§ 3553(b)(1) and 3742(e)).
Court’s sentencing decisions in unflattering terms:

*Blakely* cannot be grasped merely by a close reading of its separate opinions. Indeed much of what is difficult about the case stems from a cluster of closely related decisions the Court has handed down—and the nonsensical interactions this body of precedent can have within the Court’s newly discovered Sixth Amendment jurisprudence. As things stand, there are so many exceptions to the new safeguards announced in *Apprendi* and *Blakely*—and many of them are important exceptions—that we are left with a kind of constitutional “Swiss cheese.”

Co-authors of an article in the *Stanford Law Review* concluded in a similar vein that the Court has a “history of blunders and retreats” when it has constitutionalized substantive criminal law. Their assessment of *Apprendi* and *Blakely* is that, as in other instances when the Court has blundered, it will now (hopefully) “more or less withdraw from the field.”

One other theme is important for understanding the intensity of the response to *Booker*. The point begs a brief historical diversion.

Beginning in the 1970s, a coalition of liberal and conservative commentators mounted a challenge to the dominant indeterminate sentencing model in effect in the United States at that time. Probably the single most influential voice for sentencing reform was that of Federal District Court Judge Marvin Frankel. His widely cited book *Criminal Sentences: Law Without Order* argued that current sentencing practices were discriminatory and irrational, varying dramatically from one judge to another. He urged creation of a highly respected sentencing commission that would develop specialized expertise and would be insulated from direct political influence. Guidelines developed by the commission would lead to greater consistency and procedural fairness.

By the time Congress enacted legislation creating the Federal Sentencing Commission, Republicans were in control of the Senate and crime had become a partisan political issue. As summarized by one commentator, when the Commission finally began its work, “Frankel’s aims for the Commission

28. Tonry, supra note 27.
30. Tonry, supra note 27.
31. Id.
32. Id.
(political insulation and specialist expertise) and for the Guidelines (procedural fairness and reduced disparities) were no longer in vogue." Resulting sentences were harsher than anticipated when first proposed, influenced by the politics of the day. Mandatory minimum sentences, especially for drug offenses, undercut Frankel's vision for an independent sentencing commission.

In addition to increasing the length of prison sentences, the Guidelines have from their inception been unpopular with federal judges of all political persuasions. They are notoriously complex, including a 258-box grid. As one commentator has observed, judges and their clerks must sort through "a 629 page guidelines manual with 1100 pages of appendices and more legalisms than Jarndyce v. Jarndyce." The extraordinary level of complexity has not led to greater equity in sentencing but instead has led to greater sentencing disparity. No doubt a result of the increased politicalization of crime and punishment, the guideline system deprived judges of much of their discretion in departing from the Guidelines as well. And that was before Attorney General Ashcroft and Congress got serious about "liberal" judges.

In February 2003, the Senate unanimously passed the Prosecutorial Remedies and Other Tools against the Exploitation of Children Today Act ("PROTECT Act"). The Act's main focus is the prevention of kidnapping and a nationwide notification system (the "Amber Alert"). While this portion generated

33. Id. at 41.
34. Id.; see also Albert W. Alschuler, Purpose: Disparity: The Normative and Empirical Failure of the Federal Guidelines, 58 STAN. L. REV. 85, 85 (2005) (arguing that disparity has increased under the Guidelines).
35. See Jose A. Cabranes, Sentencing Guidelines: A Dismal Failure, N.Y. L.J., Feb. 11, 1992 ("[T]he Sentencing Guidelines system is a failure - a dismal failure, a fact well known and fully understood by virtually everyone who is associated with the federal justice system."); Robert Weisberg & Marc L. Miller, A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform Introduction, 58 STAN. L. REV. 1, 2 (2005) ("[The Federal Guidelines] have been the subject of sustained criticism from judges, lawyers, scholars, and members of Congress, and a wide consensus has emerged that the Federal Guidelines have in many ways failed.").
37. Alschuler, supra note 34, at 117.
38. Id.
39. See Frank O. Bowman, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 COLUM. L. REV. 1315, 1322 (2005) (arguing that judges’ broad discretion in sentencing fell into disfavor during the 1970s and 1980s partly because there was an increase in crime and “mounting evidence that prisoners were not being rehabilitated”). The author suggests that the unification of the congressional right and left on the issue resulted in the creation of the Guideline system. Id.
40. After passage of the Act, Ashcroft made clear that the Department of Justice (DOJ) would take the newly granted power seriously. See Mark H. Allenbaugh, The PROTECT Act’s Sentencing Provisions, and the Attorney General’s Controversial Memo: An Assault Against the Federal Courts (Aug. 13, 2003), available at http://www.nacdl.org/public/nsf/legislation/ci_03_41?OpenDocument (on file with the McGeorge Law Review). Ashcroft issued a memorandum to all federal prosecutors explaining DOJ’s policies on downward departures in light of the PROTECT Act. Id. It states that prosecutors’ “acquiescence” in downward departures should be a “rare occurrence.” Id. Furthermore, it requires that if a judge imposes a departure over the objections of the prosecutor, the prosecutor must report the departure to DOJ within fourteen days. Id.
no controversy, an amendment proposed by Congressman Thomas Feeney did.\footnote{42} Feeney’s amendment targeted what he and its other supporters saw as a flawed federal sentencing scheme that provided for the “long-standing and increasing problems of downward departures” while leaving “upward departures virtually nonexistent.”\footnote{43} The expressed purpose of the Feeney Amendment was “to ensure more faithful [judicial] adherence to the guidelines.”\footnote{44} It would impose “strict limitations on departures by allowing sentences outside the guidelines range only upon grounds specifically enumerated in the guidelines as proper for departure.”\footnote{45} This would “eliminate ad hoc departures based on vague grounds.”\footnote{46}

The PROTECT Act made several sweeping alterations to federal sentencing law. It mandated a \textit{de novo} appellate standard of review for all departures from the Guidelines.\footnote{47} This replaced the more limited due deference standard established by the Supreme Court in \textit{Koon v. United States}.\footnote{48} Additionally, it created a variety of cumbersome reporting requirements for the judiciary. For example, it required sentencing judges to offer a written statement justifying all departures exceeding twenty-four months in duration.\footnote{49} Furthermore, within thirty days of judgment, the law required the chief judge of each district to provide a report, to be made available to Congress or the Department of Justice, including extensive information about the case.\footnote{50}

The Act also instructed the Attorney General to report certain details to both the House and Senate Judiciary Committees, including the facts of the case, the judge’s identity, and the stated reasons for departure from the Guidelines.\footnote{51} Finally, instead of guaranteeing at least three positions for federal judges on the Federal Sentencing Commission, which was previously required, the Act limited the number of federal judges on the Commission to no more than three.\footnote{52}

\begin{thebibliography}{52}
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\bibitem{44} \textit{Id.} at 763.
\bibitem{45} \textit{Id.}
\bibitem{46} \textit{Id.}
\bibitem{47} PROTECT Act § 401(d)(2); Heller, \textit{supra} note 43, at 764.
\bibitem{48} 518 U.S. 81, 97-98 (1996).
\bibitem{49} PROTECT Act § 401(c); 18 U.S.C. 3553(c)(1) (2000); Heller, \textit{supra} note 43, at 764.
\bibitem{50} The report must describe:
\textquote{[T]he sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines . . . [and] shall also include—(A) the judgment and commitment order; (B) the statement of reasons for the sentence imposed . . . (C) any plea agreement; (D) the indictment or other charging document; (E) the presentence report; and (F) any other information as the Commission finds appropriate.}
PROTECT Act § 401(h)(w)(1).
\bibitem{51} \textit{Id.} § 401(i)(2); Heller, \textit{supra} note 43, at 765.
\bibitem{52} PROTECT Act § 401(n); Heller, \textit{supra} note 43, at 765.
\end{thebibliography}
Not surprisingly, the Feeney Amendment faced extensive criticism from the federal bench, defense attorneys, and numerous public interest groups. Judges resented the Amendment’s many restrictions. Not only did it require district courts to justify their departure decisions in writing, it also granted broader appellate review of downward departures. Furthermore, it limited the composition of the Sentencing Commission to a maximum of three judges and instructed the Commission to enact new guidelines to ensure a reduction of downward departures. Adding to the criticism was “the widely-held impression that [the Act] hastily passed through Congress without the benefit of public hearings and with very little debate on its potential consequences for sentencing law.”

“An already difficult situation has been made worse by Congress’s recent passage of certain provisions . . . [of] the PROTECT Act of 2003,” Judge Myron H. Bright of the United States Court of Appeals for the Eight Circuit wrote in his concurring opinion in United States v. Flores. “[T]his enactment will exacerbate the problems with the Guidelines by making it even more difficult for district judges to do justice under the law as circumstances warrant.”

Judge Rodney S. Webb of the United States District Court for North Dakota summarized many of the criticisms of the Guidelines system generally and the Feeney Amendment specifically, in United States v. Dyck:

We must adopt sentencing goals beyond retribution and deterrence. Our current system costs too much and we are in danger of losing a substantial portion of a whole generation of young men to drugs as their futures rot within our prisons. A society can be tough on crime without being vindictive, unjust or cruel. We must encourage flexible and innovative sentencing such as drug courts, drug treatment and supervised probation as an alternative to prison. Change is hard, but change is not impossible. Judges and others involved in the criminal justice system must speak out against unjust and unwise mechanisms of justice such as strict guidelines and mandatory minimum sentences.

53. Goldsmith, supra note 42, at 948.
54. Id. at 949-50.
56. 336 F.3d 760, 768 (8th Cir. 2003).
57. Id. He further stated:
I want to conclude by making a plea to the district judges of this country who feel that they should have some say and some discretion in sentencing. Let your opinions disclose your views about the injustice in the sentencing decision or decisions you are obligated to impose by Congressional mandate and/or the Sentencing Guidelines.
Let me say further that judges generally do not object to appropriate guidelines for sentencing decisions but the time has come for major reform in the system. I say in this concurring opinion, as I have said in other sentencing opinions that I have written, “Is anyone out there listening?”

Id.
Criticism came from across the political spectrum. Judge Shira A. Scheindlin said she had never before seen "judges of all political stripes so willing to go public over such a highly political matter." District Court Judge John F. Keenan has proclaimed, "I'm a Republican, but I don't think this is good legislation . . . . I don't know of any federal judge who thinks it's a good idea." \(^5\)

Meanwhile, at least two United States Supreme Court Justices, Anthony Kennedy and the late William Rehnquist, criticized the Guidelines and the Feeney Amendment. "Our resources are misspent, our punishments too severe, our sentences too long," said Rehnquist to the American Bar Association at its annual meeting in San Francisco. \(^6\)

Soon after Congress enacted the PROTECT Act, Chief Judge Marilyn Hall Patel of the United States District Court for the Northern District of California attacked the PROTECT Act and Ashcroft memo in United States v. Mellert:

Under this new regime not only will the government determine the charges to be filed, whether the indictments will undercharge or overcharge the criminal conduct, or, whether it will engage in pre-indictment or post-indictment maneuvering to bring about the government's desired result, but it also will be the only voice heard when adopting statutory sentences and Sentencing Guidelines with less and less discretion afforded to the courts and the Sentencing Commission. To put it more bluntly, the wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is shucked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative and executive branches. \(^6^1\)

Patel continued, quoting Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit:

"[A]n independent judiciary which applies rules of law . . . is a pain in the neck to any government that wants to get things done." The judicial branch should not be timid nor fearful of inflicting an occasional whiplash or, where necessary, even imposing chronic pain when Constitutional rights are threatened or the balance of powers is jeopardized. \(^6^2\)

\(^5\) Heller, supra note 43, at 772.
\(^6^2\) Id.
Former United States Attorney John S. Martin cited the PROTECT Act and its reporting requirements as integral to his decision to retire after thirteen years as a federal district judge. He explained in the *New York Times* that the Guidelines hinder judges in their ability to calculate fair sentences, and he "no longer want[ed] to be part of our unjust criminal justice system." Martin stated that when he became a judge, he "accepted the fact that [he] would be paid much less than [he] could earn in private practice" because he "believed [he] would be compensated by the satisfaction of serving the public good—the administration of justice." However, he stated that such optimism was "replaced by the distress [he felt] at being part of a sentencing system that is unnecessarily cruel and rigid.”

Some critics described the reporting requirement as a judicial “black list,” with at least one court labeling it “an unwarranted interference with judicial independence and a clear violation of the separation of powers set forth in the United States Constitution.” Specifically, Senator Edward Kennedy suggested that the reporting requirements will create a “blacklist” of federal judges who make downward departures, and Democrat John Conyers of the House Judiciary Committee called the requirement a “‘scary’ effort to assemble an ‘enemies list’ of lenient judges.” Additionally, the late Chief Justice Rehnquist warned that the reporting requirement would “seriously impair the ability of courts to impose just and reasonable sentences.”

Furthermore, Judge Paul Magnuson of the United States District Court of Minnesota wrote in *United States v. Kirsch*, that Congress’ goal was to intimidate judges from departing from the Guidelines. He argued further that:

The reporting requirement has another, more invidious effect. Although the Court has a high regard for the Assistant U.S. Attorney who prosecuted this matter, there will be other cases in which the prosecutor will misuse his or her authority. Due to the requirement of reporting departures that is now in place, Courts are no longer able to stop that abuse of power. The reporting requirements will have a devastating effect on our system of justice which, for more than 200 years, has protected the rights of the citizens of this country as set forth in the Constitution. Our justice system depends on a fair and impartial judiciary that is free from intimidation from the other branches of government.

67. *Id.*
The departure reporting requirements constitute an unwarranted intimidation of the judiciary. 68

Judge Sterling Johnson, Jr. of the Eastern District of New York and former Commissioner to the United States Sentencing Commission, "issued a wide-ranging order that directly contradicts the [Feeney Amendment's] provision granting Congress more direct access, without the need for judicial permission, to a variety of case documents," prompting the New York Times to describe it as "perhaps the boldest criticism of the [Feeney Amendment]" yet. 69 In defiance of the law's provision allowing for congressional inspection of case documents, Judge Sterling ordered all his case documents sealed. Johnson stated that his order was within his legitimate judicial authority, because while "Congress has the authority to make law, . . . federal judges have the authority to seal documents in cases over which they preside." 70 According to Judge Johnson, "[a]t some point you have to take a stand. If Congress wants to make a deck of cards for the judges like they did for the bad guys in Iraq, then make me the ace of spades." 71

Additionally, the Judicial Conference of the United States voted to urge the repeal of significant provisions of the PROTECT Act. At the time, the Judicial Conference was a twenty-seven-member body headed by the late Chief Justice and included the chief judges of the United States Courts of Appeal and a district judge appointed for a minimum of three years from each circuit. The judges criticized the law because it "severely limits the ability of trial judges to depart from the Sentencing Guidelines and requires reports to Congress on any federal judge who does so." They urged Congress to repeal the Feeney Amendment measure ordering the Sentencing Commission to release files with judge-specific information to the Attorney General and opposed the requirement that the Justice Department give the Judiciary committees judge-specific downward departure information. 72

I do not want to leave the impression that Booker has resolved the controversy surrounding the Guidelines and the Feeney Amendment. For example, Professor

68. United States v. Kirsch, 287 F. Supp. 2d 1005, 1007 (D. Minn., 2003). Other judges raise similar concerns. For example, Judge Roger P. Patterson, Jr. of the United States District Court for the Southern District of New York wrote in United States v. Kim:

In their latest attack on the third branch of the government, Congress not only attempted to restrict the ability of trial judges to impose fair sentences based on the particular facts presented in each case, but also . . . required that the Department of Justice report to Congress all cases in which the trial judge departs from the guidelines in non-cooperation cases. Evidently, Congress sought to deter any departures by the implicit threat to trial judges that, if they are considered for appellate positions, they will be subjected to the type of demeaning and unseemly treatment which nominees to the courts of appeals have undergone at the hands of Congress in recent years.


70. Id.

71. Id.

Reitz has cautioned that "Booker has reduced the mandatory character of the Federal Guidelines, but the degree of change should not be overstated." As a number of commentators have argued, Booker has not rendered the Guidelines meaningless. Nonetheless, one other way to understand Booker is to see it as the Court's effort to reclaim some territory from Congress and the Executive.

My opening remarks are intended to suggest why Booker has garnered so much attention. It is more than a symptom of a divided Court. Instead, it highlights the conflict among the three branches of government. But Booker has not ended the debate. It leaves open questions whether Congress will or should respond. For those of us concerned about congressional overreaching in the area of criminal sentencing, perhaps a positive consequence of recent scandals in Washington is that those scandals have diverted energy and attention from sentencing law.

I do not know whether Booker will remain an important question in the long term. But in the short term, it is an extraordinarily important decision. The major importance of the McGeorge Law Review's symposium is to allow us to speculate about the post-Booker landscape. The law review editors have assembled a distinguished group of scholars to explore that landscape.

Our first presenter, Professor Diane Courselle, fleshes out a number of important themes reflected in Booker. After she describes "The Road to Booker," she explores what Booker and the cases leading to it tell us about the Court's ambivalence towards juries.

For Courselle, cases like Apprendi are grounded in the notion that the jury is a bulwark against "'oppression and tyranny on the part of rulers.'" The Court decided Apprendi and its predecessor, Jones v. United States, after a wave of state sentence enhancement statutes that increased both the length of criminal sentences and legislative control over the length of those sentences. Abandoning a formal distinction between "elements" of the crime and sentencing factors allowed the Court to extend the right to have a jury determine the facts necessary to trigger the sentencing enhancement.

Extending the right to a jury in such circumstances may be costly and impractical. Further, even in Blakely, the dissent pointed out alternatives that

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73. Reitz, supra note 11, at 156.
75. See generally David Westphal, Bush's Hold on GOP in Congress Weakens, SAC. BEE, Feb. 26, 2006, at A1 (discussing the recent controversies that have caused the previously loyal Congress to openly criticize the President, such as the failed ports deal, the domestic eavesdropping program, the new Medicare drug program, and the failed Miers nomination).
77. Id. at 517 (citation omitted).
78. Id. at 515.
79. Id. at 517.
were less attractive than mandatory guidelines. For example, under the Court’s precedent, a state might return to a scheme whereby judges were left with unfettered discretion—the situation that prevailed prior to the move towards guidelines.80

Courselle then develops numerous instances in which the Court has shown distrust of juries, including instances in which it has found juries unable to determine sentences or civil sanctions.81 Booker may well be understood as another instance in which the Court, or at least the curious split within the Court, shows its ambivalence about the capacity of lay jurors.

In Making Sense of Apprendi and its Progeny, Professor Erwin Chemerinsky examines the bewildering distinctions that the Court has made in its Apprendi-Sixth Amendment case law and tries to bring coherence to the field.82 As he observes, each of the distinctions in that line of cases “seems arbitrary and highly questionable.”83 He explains the distinctions by reference to the shifting majorities, almost always five to four, with the shift of one Justice responsible for the Court’s holdings.84 Given this array, I confess awe with Chemerinsky’s efforts to make sense out of this line of cases.

Anyone familiar with Chemerinsky’s impressive body of work should not be surprised that he does a credible job of bringing a semblance of coherence to the Court’s case law. He finds in Apprendi and its progeny a simple proposition that, “under the Sixth Amendment, it is wrong to convict a person of one crime and sentence that person for another.”85 Thereafter, the first section of his article makes a strong case that that is exactly what the Court had in mind in Apprendi and why that is an appropriate rule of law.86

The remainder of his article explores several areas of Supreme Court jurisprudence that would have to be rethought if the Court were to acknowledge the simple proposition that explains Apprendi. For example, among the several points that he makes, he argues that using acquittals as a basis for sentencing enhancements would violate double jeopardy,87 that Booker’s distinction between advisory and mandatory guidelines must fall;88 and that a court cannot impose a mandatory minimum sentence without submitting the question to the jury.89

80. Id. at 521.
81. Id. at 521-26.
83. Id. at 531.
84. Id. at 531-32.
85. Id. at 532.
86. Id. at 533-36. He acknowledges that his interpretation leaves open how the Court should analyze what constitutes a crime. Id. at 536. As he stated during his presentation at our live symposium, that is a difficult question but the subject of another article.
87. Id. at 537-40.
88. Id. at 540.
89. Id. at 541-42.
Chemerinsky's expectations for the Court may seem quixotic, especially for a Court that has been so deeply divided for so long. But both the fact that two new Justices are on the Court, and the fact that so many of the cases discussed in *Making Sense of Apprendi* were five to four decisions, make his thesis worth testing. Given Chemerinsky's impressive history of pro bono litigation, I have no doubt that he will be called on, at a minimum, to submit an amicus brief advancing his thesis.

Perhaps not surprisingly, Professor Norman Bay, formerly the United States Attorney for New Mexico, is interested in exploring prosecutorial discretion under the Guidelines and *Booker*. He starts by exploring how the Guidelines changed the balance of power between judges and prosecutors and then considers the extent to which *Booker* alters that balance.

Bay reminds us that judges lost the discretion they had exercised in an indeterminate sentencing regime and that prosecutors gained power under the Guidelines. The power that "prosecutors have always had in making charging decisions" was amplified by the Guidelines. "Real offense" sentencing also enhanced prosecutorial power because prosecutors influence this process through the evidence they introduce as relevant conduct. In addition, he argues that prosecutors also hold the key to sentences below what might otherwise be imposed by the applicable Guidelines range. Finally, indirectly, the sheer complexity of the Guidelines may add to prosecutorial power.

Bay's article poses an important question: now that the Guidelines are advisory, how has *Booker* affected prosecutorial discretion? In theory, the Guidelines are no longer mandatory and prosecutors have less power to control sentencing. But stealing a line from Mark Twain, Bay contends that "reports of the demise of prosecutorial discretion have been greatly exaggerated."

Prosecutors retain great power, in part, because of important limits on *Booker*'s reach. *Booker* left untouched many aspects of prosecutorial discretion. They still possess the power to select charges for indictment. Even without the Guidelines, prosecutors can file charges that carry mandatory-minimum

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91. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003). In this case, Chemerinsky served as appellate counsel to the petitioner.
93. *Id.* at 555-56.
94. *Id.* at 556.
95. Relevant conduct rules require the district court to consider the actual offense conduct, including facts that may not have been specified in the indictment or established as elements of the charged offense. While courts have long had this discretion, under the Guidelines, once the judge makes the requisite findings she must take them into account at sentencing. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2005).
97. *Id.*
98. *Id.* at 550.
99. *Id.* at 551.
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penalties. Prosecutors also “retain the power to grant substantial assistance motions and the power to introduce evidence at sentencing to argue that a defendant’s relevant conduct ought to result in an enhanced sentence.” Similarly, prosecutors retain their plea bargaining power.

Prosecutors’ power also remains intact because sentencing courts are likely to deviate from the Guidelines sparingly. District courts must still consult the Guidelines, and while the law is emerging, “a Guidelines sentence is a safe harbor of sorts,” likely to be found reasonable by the appellate courts. Furthermore, “judges may be acculturated to the Guidelines,” especially those judges who have known only the Guidelines regime. Moreover, federal judges are “apt to use their discretion carefully so as to avoid giving the impression of judicial overreaching,” especially in light of their awareness of Congress’ interest in the subject.

Bay also argues that bargain theory helps explain why Booker’s reach may be limited in some cases. Although downward departures have gotten most of the attention, judges may depart upwards from the Guideline-recommended sentence. Even more so than before Booker, parties must evaluate a sentencing judge’s predilections. Uncertainty enhances risk; risk may create more pressure to enter into a plea agreement. There may be an increase in prosecutorial discretion “on an ad hoc basis in a post-Booker world, for a defendant may fear receiving a sentence at the statutory maximum.”

His article ends with a question about the future: the wild card in all of this post-Booker analysis is what Congress will do now that the Guidelines are advisory. He concludes that legislative action should not be driven by concern for the post-Booker loss of prosecutorial discretion. “Otherwise, the Guidelines and Booker may give rise to the most unwarranted and ironic disparity of all: concern for federal prosecutors and executive power, rather than the overall fairness of the criminal justice system and sound sentencing policy.”

100. Since the Guidelines were first enacted, Congress has passed a slew of statutes that impose mandatory-minimum penalties. There are over 100 of these statutes and their constitutionality is not in question. Independent of the Guidelines, they provide prosecutors with a significant amount of leverage, particularly with respect to charging decisions and in plea bargaining. The mandatory minimum laws trump the Guidelines so, a Guideline sentence cannot be “less than any statutorily required minimum sentence.” Prosecutors continue to possess charging discretion that determines if a defendant will be subjected to a mandatory minimum penalty. Id. at 562-64 (citation omitted).

101. Id. at 561.

102. Id.

103. Id. at 575.

104. Id.

105. Id. at 564-65. As he observes, post-Booker statistics compiled by the United States Sentencing Commission reveal that judges are, in fact, following the Guidelines in the majority of cases, though at the low end of the historical compliance rate. By and large, most sentences fall within the relevant Guidelines sentencing range.

106. Id. at 575.

107. Id. at 575-76.

108. Id. at 576.
In The Under-Appreciated Value of Advisory Guidelines, Professor Erica Hashimoto reviews the history of the Sentencing Reform Act and contends that Congress failed to make clear why it chose mandatory rather than advisory guidelines. Her thesis is intriguing: she argues that not only are mandatory guidelines not warranted today, but that they were unnecessary even in 1984. Her position challenges the conventional wisdom that judicial discretion was exercised arbitrarily. Further, her article argues that Congress should reverse Booker by imposing mandatory sentences.

Hashimoto starts with the unusual political coalition that resulted in the passage of the Sentencing Reform Act. As she summarizes the point, “in 1978, the convergence of interests of liberal senators concerned about sentencing disparity and conservative senators concerned about overly-lenient judges resulted in the passage, by a vote of ninety-one to one, of the Sentencing Reform Act as a part of the Omnibus Crime Control Act of 1984.” The House Judiciary Committee opposed the bill because the bill included mandatory guidelines. Only by attaching the bill to an appropriations bill needed to avoid government shutdown did Congress enact the law.

In light of Booker, Hashimoto asks whether mandatory guidelines are necessary. She reframes her inquiry as follows: if mandatory guidelines were necessary in 1984, perhaps they remain appropriate today. But her thesis is that they were unnecessary then and remain unnecessary today.

She argues that the concerns that drove the passage of the Sentencing Reform Act, sentencing disparity and leniency, did not result from intentional decisions by judges to impose disparate and lenient sentences but from a lack of guidance from Congress. Not only were sentencing provisions open-ended, but the sentencing judge lacked data on what other judges would do in similar cases nationwide. While Congress enacted open-ended sentencing provisions, it neither articulated a guiding philosophy nor specified relevant sentencing factors.

110. Hashimoto, supra note 74, at 577.
111. Id.
112. Id. at 588.
113. Id. at 580 (citation omitted).
114. Id.
115. Id. Professor Hashimoto also describes more recent efforts in the PROTECT Act to limit the ability of judges to make downward departures from Guideline sentences. Id. at 581, 586-87.
116. Id. at 582.
117. Id. at 582-83.
118. Id. at 583.
119. Professor Hashimoto gives the example of a judge faced with a statute, such as the provision punishing the robbery of a federally insured bank. The judge could impose a fine and/or up to twenty years in prison. Id. at 583-85.
120. Id. at 584.
121. Id. at 585.
The case for mandatory guidelines is even weaker today than in 1984. The Sentencing Commission collects and disseminates the data that was lacking prior to the enactment of the Sentencing Reform Act. Further, Hashimoto argues that the fact that judges in the post-Booker era continue to adhere to the Guideline sentences shows that any fear of undue leniency is unfounded. Implicit in Hashimoto’s article is that we are better off without another battle between the legislative and judicial branches and that Congress should leave well enough alone.

Despite the prospect that Congress will undo some of Booker, Congress cannot change its constitutional holding. As with any major holding, Booker leaves in its wake numerous possible future legal challenges. Attorney Benji McMurray explores some of the potential legal challenges now available to defense attorneys in reliance on Booker.

For years, courts held that the Confrontation Clause did not apply at sentencing but Booker and another recent Supreme Court case, Crawford v. Washington, have prompted defendants to raise the question again. Crawford rejected longstanding precedent regarding the Confrontation Clause and Booker held that the mandatory application of the Guidelines violated the Sixth Amendment of the Constitution. Read together, they suggest that the Court should reconsider the traditional view that the Confrontation Clause does not apply at sentencing.

McMurray examines the era of indeterminate sentencing, motivated largely by a rehabilitative ideal. He finds significant that, during this period, circuit courts “discussed confrontation as a due process right rather than looking to the text of the Confrontation Clause.” In the time period before the passage of the Sentencing Reform Act, judges had broad discretion to use virtually any facts before them as the basis to impose a sentence within the statutory range. By comparison, the Sentencing Reform Act had the effect of turning federal sentencing hearings into adversarial proceedings where judges hear testimony to resolve contested facts that have predictable consequences for a defendant’s sentence.

122. Id.
123. Id. at 586-87.
124. Id. at 588.
128. Id. at 595.
130. McMurray, supra note 127, at 597.
131. Id. at 600.
Decided shortly before *Booker*, *Crawford* held that "testimonial hearsay" could be admitted only if (1) the defendant had a prior opportunity to cross examine the declarant and (2) the declarant was unavailable to testify at trial.\(^{132}\) In response to both *Crawford* and *Booker*, circuit courts are now considering whether the Confrontation Clause, as interpreted in *Crawford*, applies at sentencing. So far, the circuit courts have unanimously held it does not.\(^{133}\)

Despite that fact, McMurray offers several reasons why the federal courts should reconsider the question. First, the holding that the Sixth Amendment does not apply to sentencing hearings ignores the text of the Sixth Amendment. "Like a runner who misses third base, the holding [that dismisses the Sixth Amendment in a single line] cannot stand until courts return to touch the bag."\(^{134}\) Because no court has grappled with the meaning of the Sixth Amendment, circuit courts should welcome the opportunity to resolve this issue in the wake of *Crawford* and *Booker*.

Second, *Booker* made clear the Sentencing Reform Act *did* turn sentencing into mini-trials. "In light of *Booker*, there can be no doubt that the [Sentencing Reform Act] turned federal sentencing into the type of hearing where the 'full panoply' of trial rights was required, 'including the right to confront and cross-examine the witnesses against [the defendant].'"\(^{135}\) *Booker* demands that the courts reexamine the relevant precedent because the previous cases, which held that the Confrontation Clause is inapplicable under the Sentencing Reform Act, reached the opposite conclusion.\(^{136}\)

Third, precedent is based on an erroneous understanding of the Confrontation Clause. *Crawford* "marks a fundamental shift in the Supreme Court's Confrontation Clause jurisprudence"\(^{137}\) and therefore, courts should reconsider prior holdings that stem from the previous understanding of this right.\(^{138}\)

Finally, precedent is based on now-rejected sentencing policy. Rather than rehabilitation, the focus of sentencing policy is now on measured proportionality between the crime and the punishment and mathematical uniformity between apparently similar cases. Because of shifts in policy, "courts ought to ask whether their precedents adequately take into account current attitudes about the theories of punishment."\(^{139}\)

Professor Michael O'Hear also raises a post-*Booker* legal issue.\(^{140}\) Since the passage of the Sentence Reform Act, 18 U.S.C. § 3553(a)(6) ("(a)(6)") has

\(^{133}\) McMurray, *supra* note 127, at 590 n.5.
\(^{134}\) *Id.* at 606.
\(^{135}\) *Id.* at 610 (quoting United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (1966)).
\(^{136}\) *Id.* at 610-11.
\(^{137}\) United States v. Solomon, 399 F.3d 1231, 1237 n.2 (10th Cir. 2005).
\(^{138}\) McMurray, *supra* note 127, at 612.
\(^{139}\) *Id.* at 614.
required sentencing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." O'Hear argues that despite litigation of issues arising under (a)(6), appellate courts have failed to give a systematic account of the origin and purpose of the provision.

O'Hear outlines four different circumstances in which (a)(6) has been invoked post-Booker to justify a non-Guidelines sentence. Together, these cases exhibit the potentially far-reaching consequences of a revived (a)(6) jurisprudence. The four types of circumstances include: ensuring similar sentences for similarly situated co-defendants; mitigating federal-state disparities; mitigating inter-district disparities; and rejecting Guidelines provisions that create disparities.

O'Hear develops a foundation for a framework by analyzing the text and legislative history of (a)(6).

The (a)(6) duty to avoid unwarranted disparity appears in a list of several matters that the "court, in determining the particular sentence to be imposed, shall consider." The mandatory "shall" indicates that the court must consider these matters. [But the] use of the term "consider" suggests that the court is not required to give determinative weight to any particular factor.

He concludes that "analysis of the language and structure of the statute suggests that the judiciary is authorized to make an independent evaluation—that is, independent of the Commission and the Guidelines—of what sorts of disparities are unwarranted." O'Hear argues for a two-step (empirical-normative) analysis. As to the latter, (a)(6) asks sentencing judges (1) to determine, for each case, the sentences that have been imposed in similar cases and (2) to avoid unwarranted disparities relative to the outcomes in those similar cases.

In a post-Booker world, (a)(6) "adds a distinct new factor to the sentencing calculus: the national average sentence imposed in other cases in which a defendant with a similar record was convicted of the same or similar offense."
This factor may have a meaningful role to play. First, the articulation of a number at the start of the decision-making process may play an important role in shaping the final outcome. If the national average sentence is routinely identified as salient, it might offer an alternative anchor and encourage a more open-minded approach to sentencing. 147 Second, because (a)(6) focuses on the offense of conviction, it suggests that sentences based on other factors must be specially justified. 148 Third, (a)(6) does not allow individual judges to make sentencing policy in derogation of the Commission's role, but it does allow judges to apply their personal wisdom and experience. 149 In sum, (a)(6) may be important in counterbalancing the statutory mandate for judges to "consider" the Guidelines and in ensuring the advisory Guidelines are truly advisory. 150

Professor O'Hear's thesis overlaps with the last four articles in the symposium, roughly grouped under the heading of Rethinking Sentencing Post-Booker. As indicated above, 151 unlike most constitutional holdings, Booker leaves room for congressional action. That is so because prior case law would allow Congress to set mandatory sentences, removing the role for the jury. 152 And given the confrontational atmosphere that may help explain the result in Booker, 153 Congress may act. 154 Short of that, lower federal courts are necessarily resolving issues in Booker's wake on an ad hoc basis. As a result, the symposium profitably explores the post-Booker landscape.

Professor Deborah Young explores the extent to which and how district courts have embraced their new freedom under Booker. 155 Despite some comments by judges to the contrary, sentencing pursuant to Booker is not the same as it was in the discretionary world of pre-Guidelines sentencing. Today's freedom in sentencing is moderated by the advisory Guidelines and by appellate review for reasonableness. Within these parameters, the decisions made by district courts offer insight into what works in federal sentencing and what needs reconsideration. 156

Young's examination of post-Booker cases illustrates how trial courts have interpreted and applied Booker. Because of Booker's lengthy, two-part majority

147. Id.
148. Id.
149. Id.
150. Id. at 647.
151. See supra note 24 and accompanying text.
152. Bay, supra note 74, at 640-42 (stating that Congress has enacted hundreds of mandatory minimum sentences and the constitutionality of these is not in question).
153. See supra notes 57-62 and accompanying text.
154. See Seth Stern, House Moves on Anti-Crime Packages, CQ WKLY, Mar. 10, 2006 (noting that after Booker, mandatory minimums have taken on a "new urgency" for republicans in Congress because they believe that judges will use the ruling "as a basis for issuing lower sentences").
156. Id. at 649.
opinion by two different Justices, lower courts must interpret a great deal of contentious language. Her article discusses the major issues that have developed for district courts in the wake of Booker: "[H]ow much deference district courts should give the Guidelines, how Booker has renewed consideration of previously resolved disputes about sentencing procedures, and the major areas where judges are choosing to give non-Guidelines sentences."157

While some commentators argue that the lack of a coherent sentencing philosophy to guide federal sentencing law dooms the scheme to failure, Young contends that, at least in the short run, federal district court judges with extensive experience applying the Guidelines can offer important insight into how the system ought to work.158 Further, she urges the administration, the United States Sentencing Commission, and Congress to consider the voices of these district court judges.159

Professor Young identifies differences among lower court judges in their post-Booker cases.160 Despite those differences, statistical analysis of post-Booker sentences does not show significant changes, such as a pattern of shorter sentences where judges have used a higher burden of proof, declined to consider acquitted conduct, and exercised discretion in other ways that decreased a defendant's offense level.161

Young argues that despite the circuitous route from mandatory guidelines to Booker, we have come close to the ideal of reform advanced by Senator Kennedy and many others in the 1970s.162 Congress now has the opportunity to consider that the freedom to sentence under a reasonableness standard with advisory guidelines has not yielded dramatically different sentences than those under the Guidelines.163 The best information for determining whether advisory guidelines will work for federal sentencing is by allowing judges to continue to sentence in the current post-Booker model for a significant period of time. District courts can provide a dialogue for Congress and the Commission while case law can develop through the appellate process.164 The reform movement of the 1970s stressed the need for standards to use as a benchmark, while still allowing individualized sentencing.165 Furthermore, it was recognized that appellate review of sentencing

157. Id. at 650.
158. Id. at 649-50, 687.
159. Id. at 650.
160. Her review of the case law indicates that judges differ on what weight to give the Guidelines, what standards should be applied for fact-finding at sentencing, where courts believe the Guidelines impose, rather than reduce, disparity, and what factors the courts believe are inadequately considered in the Guidelines. And, in all of these cases, there remains the tension between the Guidelines' goal of imposing consistent sentences for similar conduct and tailoring a sentence to fit an individual's circumstances, which was the judge's role for so many decades before guidelines sentences. Id. at 687.
161. Id.
162. Id. at 687-88.
163. Id. at 688.
164. Id.
165. Id.
could serve to promote uniformity.\textsuperscript{166} For the first time, district courts now have guidelines, appellate review, and the freedom to sentence.

Like Professor Young, Professor Myrna Raeder sees \textit{Booker} as an important opportunity for positive law reform. She lays out her thesis clearly: while the Guidelines were never entirely successful in producing identical sentences for men and women, the effort to do so "imposed draconian costs on families as well as on women who do not resemble the violent male drug dealers who inspired the severe federal drug penalties."\textsuperscript{167}

Raeder develops important differences between men and women, both in terms of their criminal conduct and what she calls major operational issues concerning most women’s prisons.\textsuperscript{168} For example, women offenders do not present discipline, security, and escape concerns associated with male prisoners. Instead, they need physical and mental health care and treatment for substance abuse and trauma.\textsuperscript{169} As a result, she argues, gender neutrality in sentencing fosters inequality.

Raeder identifies special concerns of women, for example, pregnancy and childbirth, that should be treated as relevant to sentencing.\textsuperscript{171} So too are privacy concerns and sexual misconduct in the correctional settings.\textsuperscript{172} She believes "that \textit{Booker}'s reasonableness analysis provides the flexibility to approve non-Guidelines sentences based on gender-related factors and caution[s] against interpreting the advisory guidelines as a straitjacket that confines the analysis of the reasonableness of non-Guidelines sentences."\textsuperscript{173} She concludes by hoping "that nonviolent women offenders can obtain the treatment to enable them to reunify with their children and succeed in the community. If not, we are likely to face... an 'orphan-class' of children who are at risk of following in their incarcerated mothers' footsteps."\textsuperscript{174}

\begin{itemize}
\item\textsuperscript{166} \textit{Id.}
\item\textsuperscript{168} \textit{Id.} at 697.
\item\textsuperscript{169} \textit{Id.}
\item\textsuperscript{170} \textit{Id.} at 691.
\item\textsuperscript{171} Professor Raeder suggests such arguments be based on fundamental rights to privacy, birth, and family. She also suggests that we place child related concerns in the broader global context of international human rights, similar to emerging arguments against practices leading to sexual misconduct in a prison setting. \textit{Id.} at 741-42.
\item\textsuperscript{172} For example, Professor Raeder argues that placement of female offenders under the supervision of female correctional officers should be a sentencing factor for women who have been previously sexually abused. \textit{Id.} at 744-56.
\item\textsuperscript{173} \textit{Id.} at 692-93.
\item\textsuperscript{174} \textit{Id.} at 756.
\end{itemize}
In *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, Professor Peter Henning uses the sentence imposed on former WorldCom CEO Bernard Ebbers as a case study for understanding *Booker* and the special issues arising under the Guidelines dealing with white collar crime.\(^{175}\)

The district court sentenced Ebbers a few months after the Court announced its decision in *Booker*.\(^{176}\) Recognizing that Ebbers' sentence was close to what he would have received under a mandatory regime, Henning uses the case "to consider where sentencing may go in the future for white collar crime cases by asking whether the twenty-five-year term handed down . . . , which will require the sixty-three-year-old Ebbers to spend most, if not all, of the rest of his life in prison, was too harsh."\(^{177}\)

*White Collar Crime Sentences After Booker* explores special features of the typical white collar criminal. Henning identifies a certain tension in white collar criminal cases. For example, white collar defendants are often "from middle- and upper-class backgrounds [and] quite often, [are] much like the judges imposing the sentences in terms of education, community involvement, and lifestyle."\(^{178}\) They are often older than their blue collar counterparts.\(^{179}\) Those factors may influence judges to impose lighter sentences than otherwise warranted.

The Guidelines limited the ability of judges to base white collar sentences on those kinds of considerations. The white collar executive of a publicly traded company who puts the company at risk or causes significant investor losses may have been subject to a "death sentence" under the Guidelines.\(^{180}\) Moreover, except when a defendant is elderly and infirm, the Guidelines do not permit a departure based on age.\(^{181}\)

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175. Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757 (2006). "Ebbers' sentence of twenty-five years in prison for securities fraud and making false statements in submissions to the Securities Exchange Commission "was one of the most severe given to a first-time offender for a crime that did not involve violence or trafficking in illegal narcotics." Id. at 757.

176. Id.

177. Id.

178. Id. at 769.

179. See id. at 766; see also DAVID WEISBURD & ELIN WARING, WHITE-COLLAR CRIME AND CRIMINAL CAREERS 33 (2002) (noting that offenders convicted of street crime generally receive their first conviction when they are in their teens, while offenders convicted of white-collar crime were arrested for their first crime at an average age of thirty-five).

180. Henning, supra note 175, at 766.

181. Id.
With those tensions in mind, Henning argues that we cannot determine whether Ebbers’ sentence, which came in below what the Guidelines would have permitted, was “too harsh” without a benchmark for determining what is an appropriate sentence in a white collar crime case.\textsuperscript{182} Henning states:

His sentence in large part conformed to the Sentencing Guidelines based on the judge’s loss calculation and consideration of the relevant factors for a downward departure. That begs the question whether the Sentencing Guidelines provide for appropriate sentences for white collar crimes, or whether sentencing under section 2B1.1 is itself too severe for the types of offenders who come within its scope.\textsuperscript{183}

At the core of Henning’s argument is that the single most important factor in white collar sentencing is the calculation of the loss, which, in the WorldCom case, was based on a determination of the harm suffered by investors from the revelation of fraud.\textsuperscript{184} While various other factors may have a small effect on the offense level for a white collar defendant, calculation of the loss suffered by victims can measure the harm caused by the defendant and serve as “‘a gauge of the defendant’s guilty mind.’”\textsuperscript{185} In light of the importance of the question of loss, he urges that the question be remitted to the jury.\textsuperscript{186}

Henning also addresses whether, “under an advisory Sentencing Guidelines system, the problem of disparity will creep back into sentencing, and if so, what are the possible responses.”\textsuperscript{187} He suggests that if discretionary sentencing in white collar crime cases results in inappropriately lighter punishments, Congress might mandate minimum sentences for offenses.\textsuperscript{188} Henning argues in favor of a mandatory minimum sentence for fraud offenses tied to the jury’s loss determination. That would enhance the jury’s role because its factual determinations would be related directly to the sentence imposed on the defendant.\textsuperscript{189}

As a result, Henning recommends that Congress amend the primary federal fraud provisions . . . by making loss (or gain) an element of the offense to ensure the jury’s role in sentencing, advanced in \textit{Apprendi}, that allows it to

\begin{itemize}
\item \textsuperscript{182} \textit{Id.} at 783.
\item \textsuperscript{183} \textit{Id.} at 784.
\item \textsuperscript{184} \textit{Id.} at 763, 766.
\item \textsuperscript{185} \textit{Id.} at 767 (citation omitted).
\item \textsuperscript{186} \textit{Id.} at 772.
\item \textsuperscript{187} \textit{Id.} at 758, 772, 777-83.
\item \textsuperscript{188} \textit{Id.} at 778-83.
\item \textsuperscript{189} \textit{Id.} at 779-80, 783.
\end{itemize}
make the crucial factual determination that will affect the defendant's sentence in a white collar crime prosecution. 190

While the remedial portion of Booker eliminates any constitutional requirement for juries to decide loss (or gain), shifting loss from a sentencing factor to an element of the offense would result in a proceeding that is more consistent with the Sixth Amendment requirement of having a jury [determine loss. This] would limit, although not eliminate, a source of potential sentencing disparity that may creep back into federal cases under the advisory Sentencing Guidelines. 191

Henning is concerned about the federal judiciary reverting back to "a system in which the personal predilections of the judge determine the outcome of the sentencing" because it is too easy for judges to identify with the white collar defendant. 192 As a result, he argues for a means to require some baseline consistency in sentencing. Because Booker no longer makes the Guidelines mandatory, imposing a mandatory minimum sentence may be the best way to assure consistency in fraud cases. 193

Finally, in Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker, Professors Erik Luna and Barton Poulson argue that Booker creates an opportunity for a fundamental change in the federal approach to punishment. 194 Their forward-looking article explains what restorative justice is, how it might be implemented in federal courts, and why criminal justice actors and others should support the concept of federal restorative justice.

Restorative justice incorporates all stakeholders in a given crime, including the offender, the victims, family members, and affected community representatives, when deciding how to respond to the crime and what consequences should flow from the crime. 195 Restorative justice recognizes that a successful criminal sanction must be backward-looking and forward-looking, as it not only condemns the offense and seeks to uncover its causes, but also facilitates moral developments and pro-social behavior in the offender. 196

Restorative justice rests on three basic principles that distinguish it from traditional attitudes toward punishment. First, it actively involves victims. 197 Second, a core premise is that the offender makes amends for the offense. 198 Finally, all of the stakeholders are committed to the sanction. 199

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190. Id. at 758, 772-77.
191. Id. at 773.
192. Id. at 777-84.
193. Id. at 757.
194. Luna & Poulson, supra note 4.
195. Id. at 789.
196. Id. at 789-90.
197. Id. at 790-91.
198. Id. at 791.
199. Id.
restorative justice contemplate that, through deliberation, the stakeholders reach agreement on how to heal the victim and the community and how to facilitate the offender’s development as a law-abiding citizen. The success of restorative justice is premised on the offender’s genuine admission of guilt and fully informed participation of all of the parties.

*Booker* opens the door for new and progressive options beyond the Guidelines. Luna and Poulson urge that we incorporate restorative justice programs. Participants in the federal system may be influenced by empirical support that restorative justice programs work. For example, they reduce fear experienced by victims and lower the rate of recidivism.

The authors recognize that restorative justice may not be appropriate for all federal offenses. They also realize that proponents of restorative justice face significant challenges in advancing their agenda. For example, they must overcome the status quo in the federal criminal justice system. No doubt, Luna and Poulson see their participation in a symposium like this one as a start for, as they argue, restorative justice activists will need to educate judges, prosecutors, defense attorneys, and probation officers about the benefits and feasibility of “restorativism.”

By way of conclusion, I find among the symposium articles some disagreement about whether the Court would have served the justice system better by applying *Blakely* to the Guidelines. But I read the articles as reflecting a couple of broad themes upon which consensus emerges. No one urges that Congress unravel *Booker* by enacting mandatory minimum sentences or otherwise trying to overrule *Booker* legislatively. Insofar as the authors urge congressional action, they urge deference to the judiciary or legislation that would adopt innovative sentencing options, rather than simply adding to the severity of existing penalties.

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200. *Id.* at 795.
201. *Id.* at 794-95. Luna and Poulson also discussed the procedural informality often associated with restorative justice. The typical model uses non-adversarial, informal procedures and provides the participants with a degree of process control over place, time, and format. Moreover, the programs tend to empower those people directly affected by the crime. They provide for open discussions of their feelings and ideas, with the victim explaining how the crime has affected his life, and what will make it better. This adds to a collaborative, consensus-based decision-making process. These programs seek to reintegrate the offender back into the law-abiding community. *Id.* at 795-815.
202. *Id.* at 812.
203. *Id.* at 798-99. Beyond the already demonstrated benefits, restorative approaches may be able to do more. Restorative justice may be able to improve perceived control, problem solving skills, social integration, and perceptions of procedural justice, each of which, in turn, has a documented connection with mental health. *Id.* at 802-07.
204. *Id.* at 812-13.
205. *Id.* at 798, 819-11.
206. *Id.* at 811.
207. Compare, e.g., Chemerinsky, supra note 82, at 534-42, with Young, supra note 155, at 687-88.
208. See, e.g., Young, supra note 155.
209. See, e.g., Luna & Poulson, supra note 4.
for lower courts to improve current excessive sentencing practices under the Guidelines by using the discretion created by Booker. No doubt, all of the symposium writers share the concern that the political arena is a too heated venue in which to make sound criminal sentencing policy.

210. See, e.g., Raeder, supra note 167; O’Hear, supra note 140.

211. We do not have to look far to find examples of legislators who seek political gains by bashing the courts. In a recent speech, retired Justice Sandra Day O’Connor shot back “at Republican leaders whose repeated denunciations of the courts for alleged liberal bias could . . . be contributing to a climate of violence against judges.” Julian Borger, Former Top Judge Says US Risks Edging Near to Dictatorship, GUARDIAN, Mar. 13, 2006, available at http://www.guardian.co.uk/usa/story/0,,1729396,00.html (on file with the McGeorge Law Review).