

**RECOMMENDATIONS FOR
FEDERAL CRIMINAL SENTENCING
IN A POST-*BOOKER* WORLD**

A Report by the Constitution Project's Sentencing Initiative

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The Constitution Project, based in Washington, D.C., develops bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education.

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The Sentencing Initiative's Blue-Ribbon Committee

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Executive Summary

The Sentencing Initiative's Blue-Ribbon Committee recommends:

1. Congress should take no action at the present time to enact sentencing legislation in response to the Supreme Court's decision in *United States v. Booker*.
2. The U.S. Sentencing Commission should act now to simplify the existing system of advisory sentencing guidelines, to the extent permitted under existing statutes. The Committee suggests several areas in which simplification would be desirable.
3. The Criminal Rules Committee of the United States Judicial Conference should initiate amendments to the discovery rules of the Federal Rules of Criminal Procedure to better promote fair notice and reliable fact-finding in the sentencing process. The Committee suggests several specific modifications to the Criminal Rules.
4. In the event that Congress determines that some legislative response to the *Booker* decision is warranted, the Committee proposes a simplified guidelines system conforming to the constitutional limits announced in *Booker* and implementing the Committee's "Principles for the Design and Reform of Sentencing Systems." The Committee offers several alternative configurations of such a simplified system.

Introduction: The Constitution Project's Sentencing Initiative

The Constitution Project, based in Washington, D.C., specializes in developing bipartisan policy solutions to controversial legal and governance issues. The Constitution Project's Sentencing Initiative was formed to respond, first, to the general sense among informed observers that the federal sentencing regime instituted in the mid-1980s was in need of careful study and some reform, and, second, to the particular challenges presented by the Supreme Court's decisions in *Blakely v. Washington*¹ and *United States v. Booker*.²

As with all of the Project's initiatives, the Sentencing Initiative is guided by a bipartisan blue-ribbon committee of experts. The Sentencing Initiative Committee (hereinafter referred to as Committee) is co-chaired by Edwin Meese III, Attorney General under President Reagan and currently the Ronald Reagan Distinguished Fellow in Public Policy at the Heritage Foundation, and Philip Heymann, Deputy Attorney General under President Clinton and currently James Barr Ames Professor at Harvard Law School. Its members and reporters are a diverse group of current and former judges, prosecutors, defense attorneys, scholars, and other sentencing experts. The group was carefully selected to achieve the greatest possible institutional and political balance. For example, when first formed, the Committee included four federal judges, two of whom were Republican appointees and two of whom were appointed by Democratic presidents. Two of the federal judges (Judge Jon Newman of the Second Circuit and then-Judge, now-Justice Samuel Alito³) sit on the federal appellate bench; two are federal district court judges (Judge Paul Cassell of Utah and Judge Nancy Gertner of Massachusetts). Many of the Committee members have experience as federal criminal litigators.⁴ In addition, although the focus of much of the Committee's work has been on federal sentencing, its members include several state judges (Judge Isabel Gomez, a state judge in Minnesota when the Committee was formed and now Director of that state's Sentencing Commission, and Judge Renee Cardwell Hughes of the Philadelphia Court of Common Pleas), an elected state prosecutor (Norman Maleng of Seattle, Washington), and an academic expert on state sentencing systems (Professor Ronald Wright of Wake Forest University), who have brought an invaluable comparative perspective to the Committee's work.

The Committee's work has proceeded in two phases. First, the Committee studied the history and present situation of American criminal sentencing, with particular emphasis on federal rules and practice, and agreed upon a set of *Principles for the Design and Reform of Sentencing Systems* (hereinafter referred to as Principles). The first eleven Principles are applicable to both state and federal sentencing systems, while the remainder of the Principles focus on the federal structure built around the Federal Sentencing Guidelines. The Principles and a *Background Report* explaining the rationale for each principle have been published and can be found at the Constitution Project's website.⁵ During the second phase of its work, the Committee crafted a set of recommendations aimed at improving the federal sentencing system in ways consistent with the Principles adopted earlier. Those recommendations follow.

Implementing the Sentencing Initiative Committee's Principles after *United States v. Booker*

The Committee's Background Report on its Principles concluded with the following observations:

What then are the implications of the Committee's work for the post-Booker world?

On one hand, the "advisory" Guidelines created by Booker undoubtedly ameliorate to some degree the Committee's concern with the excessive rigidity of the former system. Giving sentencing judges some additional measure of sentencing flexibility is a good thing. Even in this area, however, it must be noted that Booker did not address mandatory minimum sentences, which, as the Committee observed in Principle 11(b), interact with the Guidelines to render the system rigid. In any event, it remains to be seen how much additional flexibility the post-Booker regime will allow sentencing judges.

Regrettably, the remainder of the Committee's concerns about the pre-Booker guidelines system are unaddressed by the Supreme Court's decision. The Guidelines and associated sentencing statutes remain unduly complex. They continue to divide conduct into too many categories and require too many factual findings. They retain the same undue emphasis on quantifiable factors and continue to undervalue non-quantifiable sentencing considerations. They continue to place excessive emphasis on conduct not centrally related to the offense of conviction. And most critically, the basic design of the guidelines and its supporting structures remains unchanged, suggesting that Booker will have relatively little effect on the institutional imbalance at the core of the Committee's concerns about the federal sentencing process.

Accordingly, if the post-Booker advisory Guidelines are to remain the system governing federal sentencing for the foreseeable future, the Committee's work suggests, at a minimum, that modifications be made to the advisory system. Likewise, if the post-Booker advisory system is determined to be generally unsatisfactory, any effort to reconfigure the federal sentencing structure should be undertaken with the principles articulated by the Committee in mind. We hope to provide more particular suggestions in this vein in a future report.

In the following section, the Committee offers its views on the post-*Booker* advisory guidelines system and some suggestions for incremental improvements of that

system. In the final section, the subcommittee offers an outline for a more fundamental revision of the federal sentencing structure.

The Post-Booker Advisory System: A Counsel of Continued Caution, Combined with Incremental Improvement

In February 2005, shortly after the Supreme Court decided *United States v. Booker*, the co-chairs of the Sentencing Initiative wrote to the House Judiciary Committee counseling patience and caution in response to that decision.⁶ Many others concurred with their advice, and Congress has been admirably patient. In the year since *Booker*, we have learned a great deal about how the new advisory guidelines system is working and can form some reasonable estimates about how it might develop in the future.⁷ Some observers are pleased by the emerging outlines of the advisory guidelines system. Others are less enthusiastic. This divergence of views is reflected among the members of the Committee. Nonetheless, the Committee is unanimous in concluding that there remain powerful reasons for Congress to maintain a posture of caution for some time to come.

In the first place, as Mr. Meese and Mr. Heymann observed in their letter to the House Judiciary Committee, *Booker* is a complicated decision that requires federal courts to resolve a number of difficult issues before the contours of the post-*Booker* system become entirely clear.⁸ The process of resolving those issues has proceeded apace during the last year, but some additional time will be required for the most fundamental questions to be resolved. Until that has happened, we cannot know with certainty what a prolonged period of practice under the *Booker* model of advisory guidelines would be like and so cannot fairly judge whether maintenance of the current system would be wise.

Perhaps more critically, the *Blakely* and *Booker* decisions have created considerable constitutional uncertainty. At least two of the most commonly mentioned legislative responses to *Booker* – so-called “topless” or “minimum” guidelines and a legislative declaration that guideline ranges are presumptively correct – present a real risk of being declared unconstitutional.

The “topless” or “minimum” guidelines approach has been endorsed by the Department of Justice. In its original form, the proposal would have removed the tops of the existing sentencing guidelines ranges in order to comply with the apparent requirements of *Blakely v. Washington*. In the form proposed by the Department of Justice at the March 16, 2006 House Judiciary Committee hearing, “the sentencing guidelines minimum would return to being mandatory and again have the force of law, while the guidelines maximum sentence would remain advisory.”⁹ This approach depends on the continued validity of the ruling in *Harris v. United States*, 536 U.S. 545 (2002), that post-conviction judicial findings of fact can generate binding minimum sentences. As various commentators have observed, *Harris* seems contrary to the rationale of the *Apprendi-Blakely-Booker* line of jury trial decisions and may not survive

a direct challenge.¹⁰ Similarly, the question of how presumptive a sentence can be before requiring a jury finding to support it is raised by *Cunningham v. California*,¹¹ a case in which the Supreme Court has granted *certiorari*, but which will not be argued and decided until the October 2006 Term. The year-and-a-half since the *Blakely* decision has been a turbulent and disruptive period for the federal criminal justice system. Regardless of one's views on the long-term desirability of the post-*Booker* advisory system, simple prudence suggests that no legislation be passed until the constitutional rules for constructing a sentencing system are somewhat clearer.

This having been said, the post-*Booker* advisory system, while preferable to its predecessor in the eyes of many, does not address a number of concerns about the former guidelines articulated in the Committee's Report on its Principles. The Committee believes that a number of improvements to the post-*Booker* regime could be made that would not require legislation, fall short of a complete revision, and do not present potential constitutional difficulty. Incremental improvements might be made in five areas.

Guidelines Simplification

In its study of the pre-*Booker* Federal Sentencing Guidelines, the Committee concluded that one of the central defects of the Guidelines has been their complexity.¹² The *Booker* decision did nothing to make the system simpler. Indeed, federal sentencing may now have become even more complex with the addition of the "*Booker* variance" phase to the end of the guidelines sentencing process.¹³ The Committee believes that the Sentencing Commission should be encouraged to reinvigorate the simplification initiative it undertook some years ago, in an effort to reduce the complexity of the Guidelines and attendant procedures.¹⁴

Relevant Conduct

The Committee's Principle 11(c) states: "*The Guidelines place excessive emphasis on quantifiable factors such as monetary loss and drug quantity, and not enough emphasis on other considerations such as the defendant's role in the criminal conduct. They also place excessive emphasis on conduct not centrally related to the offense of conviction.*" It would be possible to modify the current guidelines to address this concern without altering their basic structure.

For example, the loss table in the theft and fraud guidelines, U.S.S.G. § 2B1.1, was simplified during the process that produced the so-called 2001 Economic Crime Package.¹⁵ Further reduction in the number of loss levels would be possible. A similar process could be undertaken with respect to the drug quantity table in U.S.S.G. §2D1.1. A thorough review of the proliferation of Specific Offense Characteristics in a number of commonly used guidelines might be even more useful. The multiplication of enhancements for particular aspects of a defendant's conduct not only produces operational complexity, but in many cases imposes cumulative sentence increases for factors that are closely correlated, such as the enhancements for high loss, gross receipts,

and complexity of scheme in the fraud and theft guideline.¹⁶ The Sentencing Commission could profitably undertake a review of these factors to determine the extent to which there may be overlap. Some overlapping factors might be eliminated in the interest of simplification, or at the least their cumulative effect might be ameliorated by an encouraged departure.¹⁷

Finally, the Sentencing Commission should reconsider the use of acquitted conduct at sentencing. The ability of judges to enhance a defendant's sentence based on conduct of which he has been acquitted has long been one of the most counterintuitive and controversial provisions of the guidelines.¹⁸ The practice is undoubtedly constitutional so long as *Watts v. United States*¹⁹ remains good law. However, some observers have suggested that *Watts* might be reconsidered in the wake of *Blakely* and *Booker*,²⁰ and, at all events, enhancing a defendant's sentence with acquitted conduct lends such an air of unfairness to the system as a whole that some attention to the question seems in order. The Committee recognizes that the problem of acquitted conduct is more complex than it may appear to the casual observer, particularly with respect to conduct as to which a defendant has been acquitted in state court, but later convicted in federal court. However, the reputation of the federal sentencing system would surely be enhanced by a rule that would bar or limit the use of conduct of which a defendant was acquitted in federal court to enhance a federal guideline sentence.

Crack and Powder Cocaine

The Committee is unanimously of the view that the 100-1 weight ratio upon which guideline and mandatory minimum sentences for powder and crack cocaine are based is unjustifiable as a matter of policy.²¹ The ratio continues to trouble many because it has a highly disproportionate impact on minorities. While legislation would be needed to change the ratio with respect to mandatory minimum sentences, the Sentencing Commission could, after appropriate consultation with Congress, make guideline changes that would at least ameliorate the harmful effects of this rule.

Improving Procedural Fairness in the Sentencing Process

The Committee's Principle 5 states, in pertinent part:

Meaningful due process protections at sentencing are essential. Fair notice should be provided and reliable fact-finding mechanisms ensured.

The Committee believes that bringing the post-*Booker* advisory guidelines into conformity with this Principle requires changes in current discovery and disclosure practices leading up to sentencing. Prior to the Federal Sentencing Guidelines, district courts had discretion to sentence defendants anywhere between the statutory minimum (if any) and maximum sentences. Courts were not required to state any reasons for their sentences or make any factual findings to support their decisions. Under this discretionary regime, the courts utilized probation officers to conduct pre-sentence investigations regarding the defendant, but these reports were not used to make factual

findings regarding disputed matters because no such factual findings were required in the sentencing process.

Under the Guidelines, in contrast, narrow sentencing ranges are determined through very specific factual findings regarding the factors enumerated in the Guidelines. Given the number and importance of the factual determinations to be made under the Guidelines, the rules of procedure should ensure that the process of litigating these factual issues is balanced and designed to produce the most reliable results possible.

The pre-existing practice of pre-sentence investigations conducted by probation officers is inconsistent with the principles underlying an adversarial system of justice and should be revised to account for the new importance of fact finding at sentencing.²² There are presently no rules governing the process by which such investigations are conducted. In practice, the parties and other interested persons submit factual information to the probation officer on an *ex parte* basis. The probation officers do not share the information submitted to them with the parties. Indeed, probation officers are authorized to promise confidentiality to sources of information and to present information without revealing its source. Even in the absence of a probation officer's grant of confidentiality to information sources, pre-sentence investigation reports do not typically cite or reference the sources of information upon which their proposed factual findings are based.

Dueling *ex parte* submissions, followed by reports without citations, do not result in the level of reliability in the fact-finding process that would result through the ordinary adversarial process. There do not appear to be any countervailing considerations to suggest that an adversarial process would be unduly burdensome or unworkable in the litigation of sentencing facts, so long as provision is made for the protection of sensitive information upon good cause shown.

An adversarial process in litigating sentencing facts could be accomplished by amending Rule 32 of the Federal Rules of Criminal Procedure to require that any party wishing to provide information regarding sentencing to the probation officer writing the pre-sentence investigation report, must, absent good cause shown, provide that information to the other party.

Specifically, new subsections (c)(3) and (c)(4) should be added to Rule 32:

(3) Availability of Information Received from Parties. Any party wishing to submit information to the probation officer in connection with a pre-sentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer.

(4) Availability of Information Received From Non-Parties. Where information provided by a non-party has been used in the preparation of the pre-sentence report or otherwise submitted by the probation officer to

the court, the probation officer shall, on request of any party, make such information available to the parties for inspection, copying, or photographing, or, if the information was provided to the probation officer in oral form, the probation officer shall provide a written summary of the information to the parties.

This Rule would substantially increase the reliability and fairness of the fact-finding process in sentencing proceedings by permitting all parties to review and comment intelligently upon information submitted to the sentencing court through its probation officer. A “good cause” exception is made where information, if revealed to other parties, may compromise an ongoing investigation or result in physical or other harm to a confidential source, the defendant, or others. Existing rules limiting *ex parte* communications should suffice to limit submissions of information directly to the Court without serving opposing parties.

It may also be necessary to repeal or amend subsection (d)(3)(B), which directs probation officers to exclude from the pre-sentence investigation report “any sources of information obtained upon a promise of confidentiality.” Probation officers should not be empowered to promise confidentiality to sources of information to be used to sentence defendants in the absence of good cause.

Protecting Crime Victims’ Rights at Sentencing

The Committee’s Principle 6 states:

Victims of crime should have the opportunity to make an impact statement at sentencing and should be treated fairly in the sentencing process.

In conformity with this principle, the Committee suggests that crime victims should be allowed to review portions of the pre-sentence report (the “PSR”), unless good cause is shown for denying access. The prevailing practice in the federal system today is to disclose PSRs only to the prosecution and the defense. This practice prevents crime victims from effectively making a recommendation about the appropriate sentence for a defendant. For example, if the victim wishes to recommend a 60-month sentence when the maximum guideline range is only 30 months, that sentencing recommendation may be meaningless unless a victim can suggest a basis for recalculating the Guidelines or departing from the Guidelines. Even in the post-*Booker* system of advisory guidelines, most courts give significant weight to the guidelines calculation. It is unfair to crime victims to deny them what every other participant at sentencing knows – the Guidelines calculations that likely will drive the sentence. A number of states give victims access to all or portions of the pre-sentence report.²³ The Committee proposes that victims receive access to those sections of the PSR describing the offense conduct and containing the Sentencing Guidelines calculation unless good cause is shown for denying them access.²⁴

Outline of a Simplified Federal Guidelines System

Should it become clear that the post-*Booker* advisory guidelines system no longer enjoys sufficient support in Congress and among the other federal criminal justice actors to maintain it, consideration of a thoroughgoing reform of the federal sentencing system will be necessary.

In anticipation of such a moment, the Committee has outlined here a significantly modified federal sentencing system that would meet three basic objectives. First, it should comply with the letter and spirit of the Supreme Court's Sixth Amendment jurisprudence in *Apprendi*, *Blakely*, and *Booker*. Second, it should conform to the Committee's Principles and address the problems with the existing federal sentencing system identified in the Report accompanying the Principles. Third, it should be sensitive to the legitimate concerns of the institutional actors in federal sentencing.

The Committee does not in this report offer draft legislation. Rather, it suggests the framework of a revised system, pointing out where appropriate different options that could be accommodated by the general structure.

A Simplified Sentencing System

Principle 8 endorses effective sentencing guidelines with meaningful appellate review as a critical component of a desirable sentencing system. Principles 11A and 11B decry the pre-*Booker* guidelines' complexity and rigidity. The Sixth Amendment jurisprudence of *Blakely* and *Booker* requires that juries find facts that establish a defendant's maximum sentence. The general principle undergirding these decisions seems to be that juries should play a larger role in finding facts that establish the range of punishments within which a defendant will probably be sentenced.

These considerations argue for a system that is simpler and gives jury fact-finding a somewhat greater role, while at the same time balancing the need to guide judicial sentencing discretion with the need to afford judges reasonable flexibility in individual cases.

Simplified Grid:

The Committee suggests that one promising approach to meeting these objectives would be adoption of a system based on a simplified sentencing grid. This grid would be based on the same two factors used in the current Sentencing Table and common to virtually all modern American guideline systems – offense seriousness and criminal history. The Committee expresses no view on exactly how many levels of offense seriousness and criminal history should make up the grid. However, its sense is that the number of offense seriousness levels should be in the neighborhood of ten, and that the number of criminal history categories should not exceed the number in the current guidelines, and might be reduced. Just as with the current guidelines, each intersection on the table would correspond to a sentencing range consisting of a maximum and minimum penalty.

The Committee has not thought it appropriate to specify exactly how the simplified grid should be structured. However, one point is plain – a markedly simpler sentencing table cannot be adopted without repeal of the so-called “25% rule,” a provision of the original Sentencing Reform Act of 1984 that requires the top of any guideline sentencing range be no more than six months or 25% higher than the bottom of the range.²⁵ Simple mathematics dictates that one cannot construct a sentencing table conforming to this rule that extends from a term of probation to a term of thirty or more years in prison with fewer than eighteen offense levels, even if the current system of overlapping ranges were eliminated.²⁶ Moreover, a sentencing table in which each sentencing range is 25% wider than the one below it means that the size of sentencing ranges increases logarithmically with each step up the seriousness scale of the sentencing table. While, as noted below, some committee members favor modest variations in the width of sentencing ranges at different points on the offense severity scale, the Committee can see no sound policy justification for the architecture of the present sentencing table. The Committee recommends that the 25% rule be repealed.²⁷

The Committee also suggests the desirability of several other features:

- The grid should contain at its low end one or more ranges that permit the imposition of purely probationary sentences, community confinement, intermittent confinement, home detention, split sentences, and other sanctions that consist wholly or in part of non-incarcerative punishments.
- The low (less serious) end of the grid should probably contain several ranges in which incarceration is required or presumed but that are narrower than the ranges higher up the seriousness scale.
- In place of the logarithmic increases in the width of sentencing ranges from the bottom to the top of the current federal sentencing table, the Committee would prefer a table with ranges in the middle to high portion of the scale of more nearly uniform width than is now the case. Some members of the Committee would prefer a grid with slightly wider ranges at the top of the seriousness scale in order to accommodate narrower ranges at the bottom. Other members would prefer that the width of the ranges in the middle to high portion of the table remain uniform.

In addition, the Committee discussed, but expressed no settled preference on, the question of overlapping ranges. Some preferred overlapping ranges. Others thought ranges without overlap would be preferable.²⁸

Role of the Jury:

In the simplified system envisioned by the Committee, in order to give jury fact-finding a larger role in the determination of a defendant’s sentence and to constrain judicial sentencing discretion, a defendant would be assigned to a box in the simplified sentencing grid based on two considerations. First, the defendant’s position on the vertical offense level axis would be based on facts found by a jury or admitted pursuant to a guilty plea. *Therefore, the maximum sentence in each box on the simplified grid*

would be the “statutory maximum sentence” as that term is defined in *Blakely* and *Booker*. Second, the defendant’s position on the horizontal criminal history axis would be determined by judicial findings regarding the defendant’s prior contacts with the criminal justice system.²⁹

Some statutory crimes would be easily assignable to one of the offense levels on the simplified grid based on proof of nothing more than the traditional pre-*Blakely* elements of the crime.³⁰ For many classes of federal crime, however, offenses could not be categorized without reference to at least some facts that have hitherto been considered sentencing factors. This is particularly true for several of the most commonly prosecuted categories of federal crime, such as narcotics and fraud offenses, where the statutes criminalize a broad range of behavior – running from the trivial to the truly heinous – but create no rules for grading crimes within that range. In effect, the drafters of the new system would begin with traditional statutory elements and add a carefully chosen subset of the sentencing factors now employed in the Guidelines (and perhaps others) to create what would amount to a new system of offense classification.

Creating a simplified sentencing table would pose two immediate challenges: first, deciding which facts should be added to traditional statutory elements to create the new system of offense classification; and second, deciding on the severity of the newly-defined element-plus-sentencing-factor offenses. Both phases would be moderately challenging, but in the view of the Committee, entirely feasible. For example, in narcotics cases, drug quantity is written into the criminal code as a factor bearing on offense seriousness. Likewise, the law has for centuries treated the amount of pecuniary loss imposed on victims as relevant to the seriousness of property crimes. The current drug and fraud guidelines place drug quantity and loss amount at the core of their calculations. A simplified system could transform drug amount and loss into jury factors by simply reducing the number of applicable subdivisions on the loss amount and drug quantity tables of the Guidelines. The addition of one or two other factors, perhaps including role in the offense or particularly egregious victim impacts, should permit creation of a simple, but rational, classification system.

The adoption of this system would address one of the consistent criticisms of the current and pre-*Booker* federal guidelines, namely that a defendant’s sentence is almost entirely driven by facts found by judges, but never determined by juries. In a system like that proposed here, the facts found by the jury or admitted by plea would determine both the theoretical maximum sentence permitted under the statute of conviction and the much smaller box or range within which sentencing would really take place. “Relevant conduct” in the old sense of non-element facts found by judges could still influence the defendant’s positioning within the smaller box, but defendants and prosecutors and judges would know the upper limit of the permissible sentence the moment the jury’s verdict was returned or the defendant’s plea entered.

Some observers have expressed reluctance to move to any system that requires more facts to be put to juries. The system proposed here would require some additional

facts to be litigated, but the simplicity of the sentencing grid would limit the number of additional jury facts to a manageable minimum.

Guiding Judicial Discretion within the Boxes of the Simplified Sentencing Grid:

As noted, the proposed new system would use jury findings or a guilty plea to place a defendant in one of the boxes of the simplified grid. The next question is whether to give judges additional guidance about where to sentence within the designated box. The Committee discussed five options:

First, one could treat the ranges of the simplified system the same as guidelines ranges under the pre-*Booker* system, i.e., allow district judges complete and unreviewable discretion to sentence anywhere within the box, with no requirement of an explanation for the judge's choice regarding the position of a sentence within the box.³¹

Second, one could allow judges almost complete discretion to sentence anywhere in the box, but require that they explain their sentences, either in general terms, or perhaps by reference to considerations mentioned in the Sentencing Reform Act or to factors listed in the guidelines, but not adopted as grading elements decided by juries. In such a system, the judge's choice of sentence within the box might be subject to appellate review on an abuse-of-discretion standard.

Third, one might identify a few factors in addition to the grading elements to be found by juries, factors deemed important to determination of offense severity that are nonetheless either difficult for juries to address or would not merit an increase or decrease of one full sentencing range. One would delegate the determination of such additional facts to post-conviction judicial fact-finding and direct sentencing judges that a finding of one or more such factors should ordinarily result in a sentence above or below the midpoint of the jury-determined range. In such a system, one might also provide a list of other factors that would impose no necessary constraint on a judge's power to select a sentence within the jury-determined range, but which the court ought to consider in determining the position of a sentence within range. Again, the judge's choice of sentence within the jury-created range might be subject to appellate review on an abuse-of-discretion standard.

Fourth, one might subdivide the boxes/sentencing ranges determined by plea or jury fact-finding into thirds, making the *middle* band presumptive, but allowing judges to decide to go up or down based on weighing aggravating and mitigating factors and deciding which predominate. Alternatively, given that so many more of the factors identified in the guidelines are aggravators than mitigators, one could make the *bottom* third of the range presumptive. Or one could make none of the thirds presumptive, requiring only that the judge explain the choice of subrange by weighing aggravating and mitigating factors. In all three variants, the most common aggravating and mitigating factors would probably be specified by the Sentencing Commission in guidelines, and the sentencing judge would be obliged to explain his or her choice of subrange subject to appellate review on an abuse of discretion standard.³²

The fifth, and most complex, option is one described in a recent law review article. In a nutshell:

- (1) The Sentencing Commission would review those sentencing factors which are now included in the Sentencing Guidelines and which it determines should not become sentencing elements submitted to the jury. The Commission would (a) eliminate altogether some sentencing factors that are infrequently used or, for other reasons, have not demonstrated their usefulness to the sentencing process; and (b) assign point values³³ to the sentencing factors it elects to keep. Aggravating factors would be assigned positive point values, while mitigating factors would be assigned negative point values.
- (2) The Sentencing Commission would determine how many points would be needed to trigger a move from one sub-range to another sub-range. The process would be similar to that now used to place defendants in Criminal History Categories along the horizontal axis of the current Sentencing Table.
- (3) Conviction by plea or trial verdict would place a defendant in the lowest (and broadest) of the three sub-ranges of the basic sentencing range corresponding to the intersection of the offense level resulting from the conviction and the defendant's criminal history score.
- (4) After trial, the court would receive a pre-sentence investigation report and conduct a sentencing hearing much as it now does.
- (5) At the hearing, the court would determine which aggravating and mitigating factors existed in the case. It would then add and subtract the point values assigned to each factor found. It would then determine the sub-range to which the defendant should be assigned. Finally, the court would select the defendant's sentence from within that sub-range in the same way it selected a sentence within the guideline range pre-*Booker*, which is to say through the exercise of largely unfettered discretion.³⁴

The Committee does not endorse any particular approach to guiding or constraining judicial discretion within the ranges determined by guilty pleas or jury fact-finding. Indeed, some Committee members favor a system with no legally enforceable constraints on judicial sentencing discretion within the ranges set by plea or jury verdict. That said, the Committee's consensus preference here, as elsewhere, is for a solution that emphasizes simplicity and flexibility. The Committee cautions those charged with choosing among various possible methods of guiding judicial discretion inside ranges set by plea or jury verdict that an unduly detailed and restrictive approach could reintroduce many of the deficiencies of the existing guidelines regime.³⁵ The best method should be determined after a thorough discussion among the affected institutional sentencing actors and other interested observers.

Sentences Above or Below the Jury-Created Range:

Sentences above the range – Under the system suggested here, because of the rule of *Blakely* and *Booker*, once a defendant was assigned to a sentencing range in the simplified grid based on the jury’s fact-finding or the particulars of his or her plea, no sentence above the top of that range would be constitutionally possible. Any upward adjustment of range in the new system could only be imposed if the government sought and obtained either a jury verdict finding fact(s) authorizing the upward adjustment or a plea admitting such fact(s). Accordingly, the new system would not permit an “upward departure” in the current sense of an upward deviation from the guideline range based on judicial findings of fact. However, the list of factors available to be put to the jury should include a class of extraordinary aggravating factors written to be employed in relatively rare cases where a particularly severe sentence was called for because of an unusually bad offense or offender.³⁶ Thus, the new system could accommodate the need for exemplary sentences in cases of unusual severity.

Sentences below the range – The Committee believes that the simplified system must include provisions for discretionary imposition of sentences lower than the bottom of the range generated by jury fact-finding or plea.

The Committee feels that substantial assistance departures very much like those permitted under the current and pre-*Booker* guidelines systems should be a feature of the new simplified system.³⁷ Such downward departures are a necessary law enforcement tool. The Committee members are of different minds on the question of whether the current government motion requirement should be retained.³⁸

The Committee also believes that judges should have a discretionary power to depart downward analogous to the power judges have enjoyed both pre- and post-*Booker*. Judicial authority to impose a sentence outside of the range resulting from jury fact-finding serves several critical functions. First, no system of sentencing rules can anticipate the circumstances of every crime or every criminal. Even the best-designed and most carefully maintained system of rules inevitably encounters cases and circumstances that were unaccounted for by its designers. Sentencing judges, acting with the advice of counsel for both government and defendant, are the actors best situated to initiate the occasional exceptions to general rules. Judges sentence numerous defendants and thus have a good sense of the normal or ordinary case. At the same time, their familiarity with individual defendants and the facts of their cases permits identification of unusual defendants and cases that merit somewhat different treatment. Second, no system of sentencing rules is perfect, even as to the ordinary case. The drafters of the Sentencing Reform Act of 1984 and of the current Federal Sentencing Guidelines assumed that the guidelines would be adjusted both up and down over time in response to feedback from many sources, including litigants, Congress, and the judiciary. One important form of feedback is the behavior of front-line sentencing actors. Departure patterns provide important evidence on the question of whether those most familiar with the federal sentencing system feel that particular guidelines are properly calibrated for most cases.

Departures should be reviewable on appeal. Once again, the Committee did not feel it necessary to opine on the details of this power, as, for example, on the precise standard of appellate review to be applied to such departures.

With respect to both substantial assistance and non-substantial assistance departures, there would be interesting questions about whether the extent of such departures should be specified by statute or guideline,³⁹ or should be reviewable on appeal. The Committee did not feel it necessary to address this question. Various options are consistent with the general framework proposed here.

The Imperative of Reasoned Explanations:

The Committee emphasizes that one important aid to the proper exercise of judicial sentencing discretion, whether within sentencing ranges or when departing outside of such ranges, is information about sentences imposed by other judges in similar circumstances and the reasons for imposing those sentences. A revised and simplified sentencing system along the lines proposed here should place a premium on careful statements of reasons by sentencing judges. Such careful statements of reasons are essential to meaningful appellate review of sentencing decisions. They are extraordinarily useful to other sentencing judges faced with analogous cases. They form an important component of the feedback to sentencing rulemakers necessary for improving any sentencing system. And they inform litigants, the Sentencing Commission, Congress, and the public about how the law is being applied, which is essential if the country is to understand and have confidence in the federal sentencing system.

Conclusion

The Constitution Project's Sentencing Initiative was undertaken in the hopeful expectation that a politically and institutionally diverse group of knowledgeable sentencing professionals could, through a process of thoughtful consultation, achieve consensus on the nature of and solutions to the problems of American sentencing policy in general, and of the federal sentencing system in particular. Our collaboration since the fall of 2004 has fulfilled that expectation. Our deliberations have been uniformly cordial, sober, well-informed, challenging, and extremely illuminating. And as we hoped at the outset, there emerged from our long conversation a remarkable degree of agreement – an agreement transcending both politics and institutional role – about the deficiencies of the federal sentencing system and about the direction any reform of that system should take. The recommendations contained in this document do not provide detailed instructions for every step that should now be taken or every improvement that might be made. We leave the elaboration of those details to others. Nonetheless, by laying out the fundamental components of a better federal sentencing system, we hope this report will provide a solid foundation upon which others can build.

¹ 542 U.S. 296, 124 S.Ct. 2531 (2004) (striking down the Washington state sentencing guideline system as violative of the Sixth Amendment right to trial by jury).

² 125 S.Ct. 738 (2005) (finding the Federal Sentencing Guidelines unconstitutional as applied, and invalidating sections of the Sentencing Reform Act of 1984 to make the guidelines “essentially advisory”).

³ Justice Alito was an active participant in the Committee’s deliberations until his nomination to the Supreme Court, at which point he felt obliged to withdraw. He participated in the formulation of and approved the Committee’s “Principles for the Design and Reform of Sentencing Systems,” but could not participate in the drafting of the accompanying Report or in the formulation of the recommendations made here.

⁴ Thomas Hillier is the Federal Public Defender for the Western District of Washington; Thomas Perez is a former Deputy Assistant Attorney General for Civil Rights, U.S. Department of Justice; Zachary Carter is the former U.S. Attorney for the Eastern District of New York; Miriam Krinsky and co-reporter Frank Bowman are former Assistant U.S. Attorneys; Ronald Wright is a former Trial Attorney with the U.S. Department of Justice; and James Felman maintains an active federal criminal defense practice as a partner in the Tampa law firm of Kynes, Markman & Felman, P.A.

⁵ See *Principles for the Design and Reform of Sentencing Systems*, available at http://www.constitutionproject.org/pdf/sentencing_principles2.pdf, and *Principles for the Design and Reform of Sentencing Systems: A Background Report*, available at http://www.constitutionproject.org/pdf/Sentencing_Principles_Background_Report.pdf.

⁶ Letter of Edwin Meese III and Philip B. Heymann to Chairman Howard Coble and Congressman Robert Scott of the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, available at http://www.constitutionproject.org/pdf/sentencing_letter_to_judiciary_2_14_05.pdf.

⁷ See U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (March 2006) (hereinafter “BOOKER REPORT”); and Frank O. Bowman, III, *The Year of Jubilee ... or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System After Booker*, 43 HOUSTON L. REV. 279 (2006).

⁸ See Letter of Meese and Heymann, *supra* note 6, at 1-2.

⁹ Testimony of William W. Mercer, Principal Associate Deputy Attorney General, before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006, at 7, available at <http://judiciary.house.gov/media/pdfs/mercerc031606.pdf>.

¹⁰ Testimony of Hon. Paul G. Cassell, U.S. District Judge, District of Utah, before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006, at 15-17, available at <http://judiciary.house.gov/media/pdfs/cassell031606.pdf>; Testimony of James E. Felman, before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, March 16, 2006, at 25-26, available at <http://judiciary.house.gov/media/pdfs/felman031606.pdf>; Testimony of Frank O. Bowman, III, before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, Feb. 10, 2005, at 9, available at <http://judiciary.house.gov/media/pdfs/Bowman021005.pdf>.

¹¹ 2006 WL 386377, Case No. 05-6551 (cert. granted, Feb. 21, 2006).

¹² See Principles, *supra* note 5 (Principle 11(A): “The Guidelines are overly complex. They subdivide offense conduct into too many categories and require too many detailed factual findings.”)

¹³ After *Booker*, sentencing judges are still obliged to make the factual findings and legal determinations necessary to arrive at a guideline range, even though the resulting range is “advisory.” *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005); *United States v. Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005); *United States v. Schlifer*, 403 F.3d 849, 854 (7th Cir. 2005); *United States v. Crawford*, 407 F.3d 1174, 1179-80 (11th Cir. 2005). A number of courts have held or implied that in order for a judge to impose a sentence below the guideline range based on a defendant’s cooperation with the government, a substantial assistance motion by the government is still required. *United States v. Bermudez*, 407 F.3d 536 (1st Cir. 2005) (finding no error in government’s refusal to file substantial assistance motion and implicitly holding that such a motion is a prerequisite for a substantial assistance departure); *United States v. Ziesman*, 409 F.3d 941 (8th Cir. 2005) (same); *United States v. Taylor*, 164 Fed. Appx. 934 (11th Cir. 2006) (unpublished) (“[B]ecause the government did not move for a downward departure, the district court was prohibited from departing from the guideline range on the basis of substantial assistance.”). *But see, United States v. Fernandez*,

443 F.3d 19, 33-34 (2d Cir. 2006) (suggesting that a judge may consider a defendant’s cooperation in setting a sentence outside the guideline range, even without a government motion). Procedurally, the only new feature of the post-*Booker* regime is an additional step of determining whether, in consideration of all the factors listed in 18 U.S.C. § 3553(a), a sentence within the range suggested by the guidelines or some other sentence should be imposed. Sentences imposed outside the otherwise applicable guideline range based on a non-guidelines Section 3553(a) factor have come to be known as “variances” or “*Booker* variances.” See, e.g., BOOKER REPORT, *supra* note 7, at 42 (defining a “variance” as “a sentence outside the advisory guideline range [that] is warranted under the authority of 18 U.S.C. § 3553(a)”); *United States v. Hampton*, 441 F.3d 284, 288 n.2 (4th Cir. 2006) (referring to factors that may “justify a post-*Booker* variance”); *United States v. Simmerer*, 156 Fed.Appx. 124 (11th Cir. 2005) (unpublished) (referring to a “post-*Booker* variance”).

¹⁴ For a listing of the staff reports prepared by the Sentencing Commission as part of this initiative, see <http://www.ussc.gov/SIMPLE/SIMPLE.HTM>.

¹⁵ For a description of the 2001 Economic Crime Package and the process that produced it, see Frank O. Bowman, III, *The 2001 Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5 (2001).

¹⁶ U.S.S.G. §§ 2B1.1(b) (loss table), 2B1.1(13)(A) (gross receipts exceeding \$1 million), and 2B1.1(9)(C) (sophisticated means).

¹⁷ See *United States v. Lauerson*, 362 F.3d 160 (2d Cir. 2004) (suggesting that a departure might be warranted based on the “cumulative effects” of multiple closely related enhancements).

¹⁸ See, e.g., Barry L. Johnson, *If At First You Don’t Succeed – Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996); Amy Baron-Evans, *Supreme Court OKs Acquitted Conduct, Sentencing Commission Invites Comment on Alternatives*, 21-Mar CHAMPION 62 (1997).

¹⁹ 519 U.S. 148 (1997).

²⁰ See, e.g., *United States v. Pimental*, 367 F. Supp. 2d 143 (D. Mass 2005).

²¹ See U.S. SENTENCING COMMISSION, COCAINE AND FEDERAL SENTENCING POLICY, Executive Summary at v-viii (May 2002).

²² For a variety of perspectives on the procedural challenges of federal guidelines sentencing, see the articles collected in Vol. 12, No. 4 of the FEDERAL SENTENCING REPORTER (Jan./Feb. 2000).

²³ ALA. CODE § 15-23-73 (1975) (“victim shall have the right to review a copy of the pre-sentence investigative report, subject to the applicable federal or state confidentiality laws”); ALASKA STAT. § 12.22.023 (giving victim right to look at portions of sentencing report); ARIZ. CONST. art. 2 § 2.1 (giving victim right to review pre-sentence report when available to the defendant); ARIZ. REV. STAT. § 13-4425 (giving victim right to review pre-sentence report “except those parts excised by the court or made confidential by law”); COL. REV. STAT. § 24-72-304(5) (giving prosecutor discretion to allow victim or victim’s family to see pre-sentence report); FLA. STAT. § 960.001 (giving victim right to review pre-sentence report); IDAHO STAT. § 19-5306 (giving victim right to review pre-sentence report); IND. CODE § 35-40-5-6(b) (giving victim right to read and “respond to” material contained in the pre-sentence report); LA. CONST. art. 1 § 25 (giving victim “right to review and comment upon the pre-sentence report”); MONT. STAT. § 46-18-113 (giving prosecutor right to disclose contents of pre-sentence report to victim); OR. REV. STAT. § 137.077 (pre-sentence report must be made available to victim).

²⁴ The Committee also discussed whether current laws governing restitution to victims are adequate. The Committee reached no consensus on this point except to suggest that further study would be desirable of questions such as whether the scope of harms compensable by restitution should be expanded or whether restitution should be mandatory regardless of a defendant’s ability to pay. For two approaches to issues of restitution and victim’s rights at sentencing, see Statement of Hon. Paul G. Cassell before the U.S. Sentencing Commission, March 15, 2006, available at http://www.ussc.gov/hearings/03_15_06/cassell-testimony.pdf; Testimony of James E. Felman, before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House of Representatives, June 13, 2006, available at <http://judiciary.house.gov/media/pdfs/felman061306.pdf>.

²⁵ The “25% rule” is codified in 28 U.S.C. § 994(b)(2).

²⁶ An eighteen-offense-level table is the minimum that can be constructed if the table is to provide continuous coverage from zero months to 30 years-to-life and provide for sentences of 30 or more years for first offenses such as murder, highjacking, and the like. To see why eighteen levels is the mathematical minimum, start with an Offense Level 1 with a sentencing range of 0-6 months, then add offense levels with the maximum possible sentencing range until you reach a range with a minimum sentence of 360 months (30 years) or more. The result is that Levels 1 through 5 have six-month sentencing ranges (0-6 months, 6-12 months, and so on), then beginning at Level 6 the top of the range is increased by 25% over the top of the next lower range (30-37 months, 37-46 months, and so on), until thirty years is reached. At least eighteen offense levels are required to cover the entire range.

²⁷ The 25% rule has been a frequent subject of criticism. See, e.g., David Yellen, *Saving Federal Sentencing Reform After Apprendi, Blakely, and Booker*, 50 VILL. L. REV. 163, 179 (2005); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1334, 1348 (2005); Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 594-95 (1992). The American Bar Association's Kennedy Commission recommended that it be repealed. ABA Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates 38-39 (August 2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

²⁸ The original Sentencing Commission created overlapping ranges largely to provide a disincentive for appeals; their theory was that litigants would be less apt to appeal a sentence within the overlapping portion of two contiguous ranges because reversal of a judicial decision producing a one-level difference would be deemed harmless error. Given the extraordinary volume of sentencing appeals that has characterized the Guidelines era, the Committee is doubtful that overlapping ranges achieved the effect hoped for by the Commission. Nonetheless, some members of the Committee believe that overlapping ranges can serve other beneficial purposes, such as reducing the impact of close calls on sentence-determinative facts and providing judges a modest additional increment of sentencing flexibility. Adopting overlapping, rather than contiguous, sentencing ranges requires that one either expand the width or increase the number of sentencing ranges on the sentencing table. Some members of the Committee view these architectural consequences of overlapping ranges as undesirable.

²⁹ So long as *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), remains good law, judges may make post-conviction findings of fact regarding a defendant's prior convictions.

³⁰ This would be simple for crimes such as homicide. For an example of how this could work, see Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. OF CHICAGO LEG. FORUM 149, 202 n. 221.

³¹ An approach much like this one is outlined in James Felman, *How Should Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT. REP. 97 (Dec. 2004).

³² This basic model was proposed in R. Barry Ruback and Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCH PUB. POL. & L. 739 (2001).

³³ Another possibility, not proposed in the original article, would be to assign ranges of point values to sentencing factors and allow sentencing judges to choose the particular value that, on their view of the evidence in the case, most nearly approximated the proper weight to be given a particular factor.

³⁴ See Bowman, *Beyond Band-Aids*, *supra* note 29, at 206-209. Professor Bowman, who serves as co-reporter to the Sentencing Initiative, has been persuaded by the course of the Committee's deliberations that a system of guiding judicial discretion within range simpler than the one outlined in the article would be desirable.

³⁵ The Committee is particularly concerned that an unduly complex and restrictive mechanism of constraining within-range judicial sentencing discretion would reproduce the conditions that led to such pronounced institutional imbalance under the Guidelines. The Committee is also cognizant of the fact that several of the more restrictive models of constraining within-range judicial sentencing discretion may depend for their constitutionality on the continued validity of *Harris v. United States*, 536 U.S. 545 (2002). See *supra* note 10 and accompanying text.

³⁶ As with other aspects of the sentencing model proposed here, the mechanism for imposing exemplary sentences could take various forms. The most obvious approach would be one in which a jury finding (or defendant admission) of an extraordinary aggravating factor would increase the defendant's offense level like any other aggravator, moving the defendant up one sentencing range. The judge would be obliged to sentence the defendant within the enhanced range absent a finding of fact(s) that would justify a sentence below range/downward departure. (See the discussion that follows on sentences below range in the proposed system.) Another option would be to identify a special class of

exemplary aggravating factors that would, if found beyond a reasonable doubt, increase the maximum sentence available to be imposed on the defendant without at the same time increasing the minimum of the applicable range. Still other approaches are possible. The Committee expresses no view on which mechanism would be preferable, though the first-mentioned would be the simplest.

³⁷ See 18 U.S.C. § 3553(e) (providing for departures below statutory minimum sentences based on cooperation with the government in the investigation or prosecution of another person); U.S.S.G. § 5K1.1 (providing for departures below the minimum guideline sentence based on cooperation with the government in the investigation or prosecution of another person); and Rule 35(b), Fed.R.Crim.P. (authorizing sentence reductions within one year of the original sentencing date for, *inter alia*, cooperation with the government in the investigation or prosecution of another person).

³⁸ The government motion requirement has been the subject of extensive commentary and criticism. See ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1473-76 (2006) (collecting authorities discussing constitutionality and desirability of the government motion requirement).

³⁹ For example, should a judge be able to depart downward to probation, or only down one or perhaps two hard ranges? Should cumulative departures be possible (i.e., could the same defendant go down one box for substantial assistance and another box for fast-track or judicial reasons)?