

BOOKER ON CRACK: SENTENCING'S LATEST GORDIAN KNOT

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INTRODUCTION

American criminal sentencing continues to be in a state of dramatic flux.¹ Applying its evolving notion of the Sixth Amendment² to both

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¹ See, e.g., Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 *EMORY L.J.* 377, 377 (2005) [hereinafter *The Next Era*] (“Criminal sentencing is in turmoil.”); Steven L. Chanenson & Frank Dermody, *In Pennsylvania, the Sentencing Remains the Same*, *PITT. POST-GAZETTE*, June 30, 2004, at A19 (noting that, in *Blakely v. Washington*, 542 U.S. 296 (2004), “a divided U.S. Supreme Court delivered a legal haymaker that has sent the criminal sentencing world reeling.”).

² See, e.g., *The Next Era*, *supra* note 1, at 400 (describing the Supreme Court’s “new conception of the Sixth Amendment jury right”); *United States v. Doe*, 412 F. Supp. 2d 87, 89 n.3 (D.D.C. 2006) (“*Booker* completed a trilogy of cases in which the Supreme Court dramatically reshaped the rules of criminal sentencing based on its interpretation of the Sixth Amendment’s jury-trial guarantee.”).

state and federal sentencing guidelines, the Supreme Court of the United States has roiled the legal waters and produced more uncertainty than it has resolved.³ On the federal level, one of the most difficult questions in this new sentencing universe revolves around the punishment for crack and powder cocaine offenses. What can and should federal judges do when faced with a suggested sentence for a crack cocaine defendant that the judge believes is inappropriate, particularly in relation to the suggested sentence for an otherwise comparable powder cocaine defendant?

In *United States v. Booker*,⁴ the Supreme Court recently decreed that the once-confining federal sentencing guidelines are now “effectively advisory.”⁵ The Court reached this conclusion on the strength of its Sixth Amendment analysis in *Blakely v. Washington*,⁶ which held that under so-called mandatory,⁷ determinate guideline systems, the jury—and not the judge—must find certain facts in order to increase the punishment within the range authorized by the legislature.

One of the most notable and widely known facets of the federal drug laws is the five-year mandatory minimum punishment provision for offenders trafficking in either five grams of crack cocaine or 500 grams of powder cocaine.⁸ This 100-to-1 quantity ratio also triggers a ten-year mandatory minimum punishment level for offenders trafficking in either 50 grams of crack cocaine or five kilograms (5,000 grams) of powder cocaine.⁹ What may be less widely known is that the United States Sentencing Commission (“Commission” or “Sentencing Commission”) maintained that 100-to-1 ratio in the federal sentencing guidelines for amounts of cocaine other than those specified in the mandatory minimum

³ Cf. Douglas A. Berman, *The Waiting is the Hardest Part . . .*, Sentencing Law & Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/05/the_waiting_in_.html (May 4, 2005, 23:48 EST) (identifying several important issues that the Supreme Court should resolve in the wake of its decisions in *Blakely v. Washington* and *United States v. Booker*); Steven L. Chanenson, *Hoist with their own Petard?*, 17 FED. SENT'G REP. 20, 20 (2004) (“*Blakely v. Washington* is the case that launched a thousand quips—as well as plenty of metaphors, clichés, and knotty legal questions.”).

⁴ 543 U.S. 220 (2005).

⁵ *Id.* at 245.

⁶ 542 U.S. 296 (2004).

⁷ I will at times employ the blunt terminology of “mandatory” and “advisory” guidelines because these descriptors are commonly used shortcuts. However, I do so with great reluctance because these terms are imprecise, malleable and often unhelpful. See Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 157 (2005) (noting that these terms “have never been wholly adequate to capture the continuum of possibilities for the design of sentencing systems,” and that no contemporary system is either purely mandatory or purely advisory).

⁸ 21 U.S.C. § 841 (2002).

⁹ *Id.*

laws.¹⁰ This is where the post-*Booker* battle over crack and powder sentencing is joined.

In the aftermath of the Supreme Court's pronouncements, one could easily wonder whether crack defendants and their lawyers should see *Booker*—the case that made the federal sentencing guidelines “effectively advisory”—as a magic bullet, a mirage, or a muddle. Some district courts are deploying *Booker* as a magic bullet to cure the ills (real or perceived) of the old crack/powder drug sentencing regime. Early decisions from the appellate courts, in contrast, indicate that the courts of appeals view defendants' hope for *Booker* as merely a mirage that disappears upon closer inspection.¹¹ The current result, perhaps unsurprisingly, is that crack sentencing after *Booker* is a muddle. Indeed, a fuller examination reveals that crack cases under the Supreme Court's new rubric present sentencing's latest Gordian Knot.¹²

This Article proceeds in three parts. Part I provides a brief background on the modern evolution of federal sentencing, including the turbulent role of cocaine offenses. We will see how the Supreme Court has used the Sixth Amendment to force dramatic changes in federal sentencing law. Part II evaluates the short-term judicial responses to crack sentencing after *Booker*, and finds them lacking in important aspects. These responses seem to ignore either the import of the Supreme Court's decision in *Booker* or the legitimate role and authority of the Congress in setting penal policy. Finally, Part III further explores the conundrum of post-*Booker* crack sentencing and offers some possible solutions.

¹⁰ See, e.g., United States Sentencing Commission, Guidelines Manual, §2D1.1(c) (Nov. 2005); *United States v. Armstrong*, 517 U.S. 456, 478 (1996) (Stevens, J., dissenting) (“The Sentencing Guidelines extend this [100-to-1] ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine.”).

¹¹ See, e.g., *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006); *United States v. Eura*, 440 F.3d 625, 627 (4th Cir. 2006).

¹² Based on the old story of the knot that only Alexander the Great could loosen (by cutting it), a Gordian Knot is now viewed as a “very difficult problem; insoluble in its own terms.” <http://onlinedictionary.datasegment.com/word/gordian+knot> (last visited Sept. 1, 2006). See also Scott Kording, Note, *Slicing Through the Gordian Knot: “Employers,” Standing, and Removal Under ERISA*, 2005 U. ILL. L. REV. 1257, 1258 (“solving apparently intractable problems with a simple solution came to be known as ‘cutting the Gordian knot’”) (citation omitted); Mike Ryan, *Azimuth, Distance and Checkpoints: Thoughts on Leadership, Soldiering, and Professionalism for Judge Advocates (JA)*, ARMY LAW. 40, 45 n.15 (2005) (“The term ‘Gordian Knot’ refers to an exceedingly complicated problem or deadlock. The term originated with the story of an intricate knot tied by King Gordius of Phrygia and cut by Alexander the Great with his sword after hearing an oracle promise that whoever could undo it would be the next ruler of Asia.”) (citation omitted).

I. A SHORT HISTORY OF MODERN FEDERAL SENTENCING AND COCAINE POLICY.¹³

A. OUT OF CHAOS CAME (TOO MUCH?) ORDER

From at least the 1800s until the late twentieth century, federal judges had wide discretion to impose sentences within the legislatively imposed statutory maximum sentence.¹⁴ In this unguided¹⁵ sentencing regime, district judges reigned essentially supreme in their courtrooms.¹⁶ Appellate review of sentences was unavailable except in extraordinary circumstances, such as where the sentences imposed were above the statutory maximum or based on overt, invidious discrimination.¹⁷ A jury's verdict of guilt or a defendant's guilty plea authorized a punishment up to the maximum set by the legislature. Within that often vast range, judges were free to do as they saw fit based on the facts as they (informally) found them. This unguided sentencing system produced a kind of Wild West¹⁸ of unregulated discretion that, in the words of one commentator from the 1970s, arguably resulted in a:

gross disparity in sentencing, with different sentences imposed upon similar offenders who ha[d] committed similar offenses by the same judge on different days, dif-

¹³ This is an (over)simplified history designed to set the framework for the current crack/powder sentencing controversy. For a more detailed history of sentencing structures and theories, see, e.g., Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1 [hereinafter *Reconceptualizing Sentencing*]; David Yellen, *Saving Federal Sentencing Reform After Apprendi, Blakely, and Booker*, 50 VILL. L. REV. 163 (2005); *The Next Era*, supra note 1. For a more detailed history of cocaine sentencing, see, e.g., Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383 (1995).

¹⁴ See, e.g., *The Next Era*, supra note 1, 390–92 (discussing history and its differing interpretations).

¹⁵ See *id.* at 381–86 (discussing terminology).

¹⁶ See, e.g., *id.* at 392; Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 25 (2000) [hereinafter *Balanced and Purposeful Departures*] (“For the first three-quarters of the twentieth century, vast and virtually unlimited discretion was the hallmark of the sentencing enterprise.”). Of course, the district judge reigned supreme solely in terms of setting the putative sentence. By at least the middle of the 20th Century, federal sentencing, like virtually all American sentencing at that time, was indeterminate in nature. Indeterminate sentencing meant that there was discretionary parole release authority, often vested in a parole board acting long after the judge imposed the sentence. As such, the actual amount of time served by a defendant depended on the independent and often disconnected actions of both the district judge at the front-end and the parole board at the back-end. Although beyond the scope of this Article, this uncoordinated, often competing authority over a defendant's actual sentence presents its own set of serious problems. See, e.g., *id.*

¹⁷ See, e.g., Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After Blakely: A Former Commissioner's Perspective*, 2004 BYU L. REV. 935, 939 (“Prior to 1984, federal judges enjoyed wide discretion in sentencing offenders. A judge could impose any punishment within the statutory maximum and still stand virtually immune from appellate review.”).

¹⁸ *The Next Era*, supra note 1, at 392.

ferent judges on different days, different judges on the same day, and different judges in different jurisdictions.¹⁹

This disparity laden approach, viewed as “lawless”²⁰ by many, also raised serious concerns about racial bias.²¹

Sentencing reformers mounted a sustained attack on this unregulated sentencing scheme.²² The result has been a more than 35-year experiment in sentencing reform.²³ One manifestation of sentencing reform has been the introduction of sentencing guidelines. Guidelines offer the sentencing judge a sentencing recommendation or frame of reference for the typical case, which is commonly based on the seriousness of the offense (as perceived by the body creating the guidelines) and the criminal history of the offender. Some guidelines are more “presumptive” or “mandatory” and require the judge to abide by the recommendations or justify any deviation, while other guidelines are more “voluntary” and allow the judge to dispense with the recommendations more readily.²⁴

On the federal level, the reformist effort to reign in judicial sentencing discretion resulted in a grand compromise of the political right and the political left, known as the Sentencing Reform Act of 1984 (“SRA”).²⁵ Among its other provisions, the SRA told federal district judges to consider a variety of factors while sentencing. Specifically, in 18 U.S.C. § 3553(a), the sentencing judge was instructed as follows:

- (a) Factors to be considered in imposing a sentence. –
The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed –

¹⁹ Richard Singer, *In Favor of “Presumptive Sentences” Set by a Sentencing Commission*, 24 CRIME & DELINQ. 401, 402 (1978).

²⁰ See, e.g., Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

²¹ See, e.g., *Blakely*, 542 U.S. at 315 (O’Connor, J., dissenting) (“Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.”) (citations omitted).

²² See, e.g., Frankel, *supra* note 20, at 1.

²³ See, e.g., Marc L. Miller, *Sentencing Reform “Reform” Through Sentencing Information Systems*, in THE FUTURE OF IMPRISONMENT 121, 121 (Michael Tonry ed., 2004) (“Sentencing has undergone more reform over the past several decades than any other area of criminal justice, and perhaps as much reform as any area of the law.”).

²⁴ See, e.g., *The Next Era*, *supra* note 1 at 395–96.

²⁵ 18 U.S.C. § 3551 et al. (2000).

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
 - (4) the kinds of sentence and the sentencing range established for –
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
 - . . .
 - (5) any pertinent policy statement –
 - (A) issued by the Sentencing Commission . . .
 - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (7) the need to provide restitution to any victims of the offense.²⁶

Despite the majestic—and arguably overwhelming—directives of § 3553(a), federal sentencing quickly became all about the guidelines. Although the guidelines were just one part of § 3553(a),²⁷ the judge typically had to impose a sentence within the guidelines’ presumptive range. Few district courts would grant—and even fewer appellate courts would approve—a deviation from the guidelines simply because the district judge thought that the purposes of sentencing under § 3553(a) would be better served by a different sentence.

A major explanation for the hegemony of the guidelines is the existence of § 3553(b)(1). Section 3553(b)(1) provided, in relevant part, that “the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from

²⁶ *Id.* § 3553(a).

²⁷ *See id.* § 3553(a)(4).

that described.”²⁸ Thus, as a widely used shorthand, many came to view the federal sentencing guidelines as largely “mandatory.”²⁹

But before the guidelines could take on such importance and power, they had to be drafted in the first place. The SRA contained provisions directing the newly formed United States Sentencing Commission to craft guidelines that take into consideration a long list of factors.³⁰ For examples, Congress instructed the Commission to consider the highest punishment authorized by Congress, the harm caused, the deterrent effect of the sentence on others, and circumstances that may aggravate or mitigate the seriousness of the offense, as well as to assure that the guidelines “reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.”³¹ This was a tall order and the Commission got to work.

Before the Commission could promulgate its first set of the federal sentencing guidelines, Congress changed the sentencing landscape radically. The year was 1986, and crack cocaine was in the news. The promising young basketball star Len Bias allegedly died because of a crack overdose.³² This highly publicized event coincided with a growing concern over the spread of crack throughout America, and resulted in a swift and substantial legislative response.³³ In an environment of urgency rather than careful reflection,³⁴ Congress passed the Anti-Drug Abuse Act of 1986.³⁵ For the purposes of this Article, the key features of

²⁸ *Id.* § 3553(b)(1).

²⁹ *Cf.*, *Balanced and Purposeful Departures*, *supra* note 16, at 58–59 (“By overly restricting the availability of departures, the Guidelines’ initial departure jurisprudence created a system that was unduly and harmfully rigid in most cases.”).

It is important to remember that the concept of a “mandatory” guideline is, at best, a crude description. *See supra* note 7.

³⁰ *See* 28 U.S.C. § 994 (2000).

³¹ *Id.* § 994(e).

³² *See, e.g.*, Sterling, *supra* note 13, at 408; Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 63 (2005) (“The fact that Bias probably snorted cocaine rather than smoked crack may have been lost in the frenzy.”); *Smith*, 359 F. Supp. 2d at 778 n. 4 (citation omitted).

³³ *See, e.g.*, Sterling, *supra* note 13, at 408.

³⁴ *See, e.g.*, U.S. SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF *United States v. Booker* on Federal Sentencing 126 (2006) (noting that “Congress responded to a national sense of urgency surrounding penalties for crack cocaine and other controlled substances by enacting the Anti-Drug Abuse Act of 1986”); William J. Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1255 (1996); *Simon v. United States*, 361 F. Supp. 2d 35, 44 (E.D.N.Y. 2005) (stating that the “Act was moved through Congress with little discussion”).

³⁵ Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified in part as amended in 21 U.S.C. § 841et seq. (2000)). Although the 1986 legislation really set and sparked the parameters of cocaine sentencing policy that is with us still today, Congress did make important additions to this area in 1988 as well. *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6371, 6470(a), 6481, 102 Stat. 4181, 4377 (1988) (codified as amended at 21 U.S.C.

that legislation were the mandatory minimum sentences for trafficking in crack cocaine and powder cocaine.³⁶ It created what has become known as the 100-to-1 quantity ratio,³⁷ where the mandatory minimum punishment for trafficking a certain amount of crack cocaine was the same as the punishment for 100 times the amount of powder cocaine. Specifically, the mandatory minimums set by Congress identified two drug-weight trigger points:

*5 grams of crack OR 500 grams of powder = 5 year mandatory minimum

*50 grams of crack OR 5,000 grams of powder = 10 year mandatory minimum³⁸

Under this legislation, district judges have no authority to sentence below the applicable mandatory minimum unless the defendant had provided substantial assistance in the investigation or prosecution of another person.³⁹ In 1986, the Commission had not yet promulgated any guidelines. Thus, with the entire federal sentencing guidelines effort still in the cradle, the Commission had to grapple with these mandatory punishments.⁴⁰

§§ 844(a), 846, 848(a) (2005), and expanding, in part, drug mandatory minimum penalties to conspiracies).

³⁶ See 21 U.S.C. § 841 (2000).

³⁷ Note that the ratio of "100-to-1" refers to the equality of punishment for the different quantity amounts of crack and powder. This quantity ratio results in sentences for crack defendants that are, on average, from three to nearly eight times longer than the sentences for otherwise comparable defendants who traffic in powder cocaine. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 145 (1995); cf. U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY iv (2002) (describing the difference as "three to over six").

³⁸ 21 U.S.C. § 841 (2000). At the discretion of the government, these mandatory minimums can be doubled if the defendant has previously been convicted of a felony drug crime at the state or federal level. If the defendant is convicted of the higher-weight mandatory offense (50 grams of crack or 5,000 grams of powder) and has previously been convicted of two felony drug offenses at the state and/or federal level, the government has the ability to trigger a mandatory punishment of life in prison.

³⁹ See, e.g., 18 U.S.C. § 3553(e) (2000) ("Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."); *Melendez v. United States*, 518 U.S. 120, 125-26 (1996). Certain comparatively less-culpable offenders can qualify for the so-called "safety valve," which Congress passed later. See 18 U.S.C. § 3553(f) (2000). For these offenders, the mandatory minimum sentences simply do not apply.

⁴⁰ Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 53 n.68 (2003) ("Mandatory minimum statutes single out one feature of an offense, and require that all the cases that display that feature receive a sentence of at least a certain number of years. However, the SRA requires that the Commission fashion guidelines that contain many gradations of offense seriousness and that place offenders in relatively narrow categories, in order to take into account many aggravating and mitigating factors. Given these requirements of the

Perhaps in part because it was concerned about otherwise being perceived as ignoring Congress's will,⁴¹ the nascent Commission chose to integrate the 100-to-1 quantity ratio into its guidelines. In doing so, it stated that "further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses."⁴² The Commission accordingly extended the 100-to-1 quantity ratio to apply to all amounts of crack and powder cocaine.

The Commission's guidelines, which initially became effective November 1, 1987 but were not fully implemented until the Supreme Court rebuffed constitutional challenges to the SRA in 1989,⁴³ required a great deal of judicial fact-finding. This included, for example, judicial fact-finding concerning the precise quantity of drugs involved, which can be more than what was alleged by the government in the indictment and proved at trial.⁴⁴ Indeed, the drug guidelines were driven primarily by the weight of the illegal substance involved.⁴⁵ Judges had to determine, by a preponderance of the evidence, the quantity of drugs in which the defendant trafficked. The guidelines' approach to drug sentencing in general has been the subject of harsh criticism for several reasons, including their perceived excessive severity⁴⁶ and their primary focus on the weight of the drugs involved as a proxy for culpability and as a justification for longer sentences.⁴⁷

B. THE GUIDELINES ON CRACK

It soon became clear that the guidelines were much more like compulsory rules with limited opportunities for judicial discretion.⁴⁸ Arguments that § 3553(a) demanded a result different than the one dictated by the guidelines had virtually no traction with the courts.⁴⁹ The courts

SRA and the simultaneous existence of mandatory minimums, how was the Commission to fashion guidelines to ensure proportionate punishment?").

⁴¹ *Id.* at 34 n.68 (listing reasons for and against the Commission's decision and stating, "Most important, failure to accommodate the statutory penalties might suggest to Congress that the Commission's approach to punishment cannot be trusted. This could lead to more mandatory minimums and further diminish the Commission's role.").

⁴² United States Sentencing Commission, Guidelines Manual, § 2D1.1 (Nov. 2005).

⁴³ *Mistretta v. United States*, 488 U.S. 361 (1989).

⁴⁴ *See, e.g.*, United States Sentencing Commission, Guidelines Manual, § 1B1.3 (Nov. 2005).

⁴⁵ *Id.* at § 2D1.1.

⁴⁶ *See, e.g.*, *United States v. Shamblin*, 323 F. Supp. 2d 757, 768 (S.D. W. Va. 2004) (describing federal sentencing of drug offenders as "draconian").

⁴⁷ *See, e.g., id.* at 765 (discussing role of drug weight).

⁴⁸ *See, e.g.*, United States Sentencing Commission, Guidelines Manual, § 5K2.0, et seq. (Nov. 2005).

⁴⁹ *See, e.g.*, *United States v. Anderson*, 82 F.3d 436 (D.C. Cir. 1996). *But see id.*, at 445-50 (Wald, J., dissenting).

pointed to § 3553(b)(1) and deferred to the Commission's judgment to extend the 100-to-1 ratio to the guidelines.

Defendants challenged the 100-to-1 quantity ratio—both in the guidelines and in the congressional mandatory provisions—on constitutional grounds. This effort was a spectacular failure, particularly at the appellate level.⁵⁰ In dismissing these challenges, the Seventh Circuit, for example, noted that “Congress in its wisdom has chosen to combat the devastating effects of crack cocaine on our society, and we believe the disproportionate sentencing scheme that treats one gram of cocaine base the same as 100 grams of cocaine is rationally related to this purpose.”⁵¹ The Eighth Circuit took a similar course in dispensing with constitutional claims against the use of the crack/powder distinction within the guidelines. It concluded that “the ‘100 to 1 ratio’ of cocaine to cocaine base in the Sentencing Guidelines is rationally related to Congress’s objective of protecting the public welfare.”⁵²

Given this legal environment, district judges largely followed the 100-to-1 quantity ratio for crack and powder cocaine sentences both under the mandatory minimum provisions and the sentencing guidelines. That did not mean, however, that the judges liked it. To the contrary, many judges railed against the different treatment of crack and powder cocaine.⁵³ Similarly, academics attacked the crack/powder punishment scheme.⁵⁴ The Department of Justice was one of the 100-to-1 ratio's few

⁵⁰ See, e.g., *United States v. Hill*, 79 F.3d 1477, 1488–89 (6th Cir. 1996) (reiterating rejection of Fifth and Eighth Amendment claims); *United States v. Lawrence*, 951 F.2d 751, 755 (7th Cir. 1991); U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 118 (1995) (“[A]ll federal circuit courts addressing the constitutionality of crack cocaine penalties have upheld the current federal cocaine sentencing scheme, including the 100-to-1 ratio.”). However, at least one state supreme court was sympathetic. See, e.g., *State v. Russell*, 477 N.W.2d 886, (Minn. 1991) (relying on Minnesota constitution).

⁵¹ *Lawrence*, 951 F.2d at 755.

⁵² *United States v. Buckner*, 894 F.2d 975, 980 (8th Cir. 1990); see also *id.* (rejecting Eighth Amendment challenge to the guidelines treatment of crack and powder).

⁵³ See, e.g., David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. Rev. 211, 220 (2004) (noting that “a significant number of judges were . . . distressed by the consequences of the mandatory minimums created by the 1986 [Anti-Drug Abuse] Act”); *United States v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) (remarking that the “unfavorable and disproportionate impact that the 100-to-1 crack/cocaine sentencing ratio has on members of minority groups is deeply troubling.”); *United States v. Patillo*, 817 F.Supp. 839, 843 (C.D. Cal. 1993); *United States v. Willis*, 967 F.2d 1220 (8th Cir. 1992) (Heaney, J., concurring).

⁵⁴ See, e.g., David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283, 1316 (1995) (arguing that the differential “undermine[s] public confidence in the fairness of our system of justice” and “serves as a stimulant to race prejudice.”) (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986)); Spade, *supra* note 34, at 1275; Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENT'G REP. 87, 87 (2003) (arguing that the 100-to-1 differential is “particularly distressing because crack defendants are primarily black and powder defendants are pri-

friends.⁵⁵ These guidelines—with the 100-to-1 quantity ratio—were controlling, constitutional and widely held in contempt.⁵⁶

C. THE SENTENCING COMMISSION REPENTS

When the Commission imposed the 100-to-1 quantity ratio, it did not offer an extensive rationale.⁵⁷ Subsequently, however, the Commission wrote on the topic at considerable length. In fact, it has tried three times between 1995 and 2002 to eliminate or reduce the crack/powder differential, but to no avail.⁵⁸ Over this series of reports, the Commission has basically asserted that: (1) the 100-to-1 ratio is disproportionate to the relative harms presented by the two drugs; (2) some of the harms associated with crack could be addressed by specific enhancements that are not drug-specific; and (3) severe crack penalties fall disproportionately on lower-level participants, and most significantly on African-Americans.⁵⁹

marily white and Hispanic, so the differential treatment can too easily be seen as a manifestation of racial discrimination.”).

⁵⁵ See, e.g., Neil A. Lewis, *Justice Department Opposes Lower Jail Terms for Crack*, N.Y. TIMES, March 20, 2003, at A24 (noting that then Deputy Attorney General Larry D. Thompson testified that the “current federal policy and guidelines for sentencing crack cocaine offenses are appropriate.”); Lee Hammel, *Crack vs. Cocaine: Caught Between a Rock and a Powder*, WORCESTER TELEGRAM & GAZETTE, Feb. 19, 2006, at A1 (noting same testimony); *United States v. Perry*, 329 F. Supp. 2d 278, 304 (D.R.I. 2005) (“In fact, it is virtually impossible to find any authority suggesting a principled basis for the current disparity in sentences.”); *United States v. Leroy*, 373 F. Supp. 2d 887, 893 n.8 (E.D. Wis. 2005) (“Indeed, one is hard pressed to find anyone willing to defend the 100:1 ratio on the merits (as opposed to merely deferring to Congress and the Commission on the issue.”).

⁵⁶ See, e.g., Editorial, *Crack Cocaine Sentencing Inequity*, 181 N.J. L.J. 394, 394 (2005) (“A chorus of voices from commentators, courts, and the Sentencing Commission itself has criticized the grossly unequal sentences.”); American Bar Association, Annual Report of the Individual Rights and Responsibilities Committee, Special Committee on the Drug Crisis, Recommendation 129 (1995) (opposing the crack/powder disparity); U.S. SENT’G COMM’N SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1997) (“Public officials, private citizens, criminal justice practitioners, researchers, and interest groups have all challenged the fairness and efficacy of the current approach to sentencing cocaine offenses.”).

⁵⁷ As noted above, however, some commentators have identified potential reasons why the Commission chose to integrate Congressional mandatory punishments into the guidelines. See, e.g., Hofer & Allenbaugh, *supra* note 40, at 34 n.68.

⁵⁸ U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002); U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

⁵⁹ See, e.g., U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xii–xiii (1995); U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997); U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v–viii (2002).

In 1995, responding to a congressional directive to study cocaine sentencing policy, the Commission issued its first report.⁶⁰ The Commission described the substances themselves:

Powder cocaine and crack cocaine are two forms of the same drug, containing the same active ingredient—the cocaine alkaloid. Powder cocaine (cocaine hydrochloride), the most commonly used form of cocaine, is produced by reacting coca paste, derived from leaves of the coca plant, with hydrochloric acid. Crack cocaine, in turn, is made from powder cocaine in a simple process that requires baking soda, water, and a stove or microwave. . . . Cocaine in any form . . . produces the same physiological and psychotropic effects. The onset, intensity, and duration of effects, however, differ according to the route of the drug's administration which, in turn, is dictated in part by the form of cocaine. Powder cocaine can be snorted, injected, or ingested; crack cocaine can only be smoked. . . . Reactions to cocaine use differ; the faster cocaine reaches the brain, the greater the intensity of the psychotropic effects. Research shows that maximum psychotropic effects can be realized as quickly as one minute after smoking crack cocaine; these effects dissipate after approximately 30 minutes. Some four minutes or more are required to achieve maximum effects after injecting powder cocaine, with the effects lasting for a similar 30 minutes. Powder cocaine that is snorted, on the other hand, takes up to 20 minutes or more to reach maximum psychotropic effect, but the "high" lasts as much as 60 minutes—twice as long as injecting or smoking.⁶¹

The Commission also stated that "[c]rack cocaine's ease of manufacture and relatively low cost-per-dose have made it more readily marketable than powder cocaine to large numbers of lower income people."⁶²

Concerning the offenders, crack defendants were, on average, younger and more likely to possess a weapon than powder defendants.⁶³ Finally, the Commission reported that 88.3% of crack defendants were Black in 1993, while only 27.4% of powder defendants were Black.⁶⁴

⁶⁰ U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY i (1995).

⁶¹ *Id.* at v–vi.

⁶² *Id.* at viii.

⁶³ *Id.* at xi.

⁶⁴ *Id.* at xi.

This was particularly noteworthy because a survey of drug use, as opposed to distribution, indicated that a majority of both crack and powder cocaine users were Whites.⁶⁵ Perhaps most disturbingly, the Commission found that “[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants.”⁶⁶

On May 1, 1995, shortly after releasing the 1995 report,⁶⁷ a 4-3 majority of the Commission promulgated revised guidelines that equalized the quantity ratio for powder and crack cocaine by reducing the penalty quantity levels for crack, and urged Congress to similarly amend the statutory mandatory penalties.⁶⁸ The Commission argued:

[S]ufficient policy bases for the current penalty differential do not exist. Instead of differential treatment of crack and powder cocaine defendants based solely on the form of the drug involved in the offense, the Commission concluded that fairer sentencing would result from guideline enhancements that are targeted to the particular harms that are associated with some, but not all, crack cocaine offenses.⁶⁹

Not only did Congress refuse to amend the statutory mandatory penalties, but it took the unusual step of rejecting the Commission's revised guidelines.⁷⁰ In doing so, Congress specifically said that any future changes should generally reflect a greater punishment for trafficking in crack as compared to trafficking in the same quantity of powder cocaine.⁷¹

⁶⁵ *Id.*; see also *id.* at xi n.9 (stating that the survey “potentially underrepresents lower-income populations and overrepresents middle or upper-income populations or those who reside in households.”).

⁶⁶ *Id.* at 154.

⁶⁷ *Id.* at xiv. The Commission did not propose a specific statutory change in the 1995 report itself.

⁶⁸ See U.S. SENT'G COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 1 (1997); Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,075–76 (May 10, 1995) (Commission's proposed Guidelines amendments); *id.* at 25,076 (“This amendment equalizes sentences for offenses involving similar amounts of crack cocaine and powder cocaine at the level currently provided for powder cocaine. It also increases punishment for all drug offenses that involve firearms or other dangerous weapons, and authorizes an upward departure for bodily injury.”); *id.* (“The Commission is recommending separately that Congress eliminate the differential treatment of crack and powder cocaine in the mandatory minimum penalties found in current statutes.”).

⁶⁹ 60 Fed. Reg. at 25,077.

⁷⁰ See Federal Sentencing Guidelines, Amendment, Disapproval, Pub.L. No. 104-38, 109 Stat. 334 (1995); see also Spade, *supra* note 34, at 1275 (discussing congressional rejection and the apparently resulting prison riots).

⁷¹ Federal Sentencing Guidelines, Amendment, Disapproval, Pub.L. No. 104-38, 109 Stat. 334 § 2(a)(1)(A) (1995).

Congress issued new reports in 1997 and 2002. Having learned its political lesson, however, it did not formally promulgate new proposed guidelines that would force Congress to act to stop them.⁷² In the 1997 report, the Commission was “unanimous in reiterating its original core finding, outlined in its February 1995 report to Congress that, although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified.”⁷³ The Commission essentially proposed a quantity ratio of 5-to-1, which was to be achieved by raising the threshold for crack and lowering the threshold for powder.⁷⁴ Congress did not respond to the Commission’s recommendation.⁷⁵ The Clinton Administration suggested a ratio of 10-to-1, but never introduced a bill to make that happen.⁷⁶

In 2002, the Commission issued its third report.⁷⁷ The Commission again criticized the 100-to-1 quantity ratio, noting that the existing penalties overestimate the relative harm of crack, apply disproportionately to lower-level defendants, and impact primarily minorities.⁷⁸ The Commission essentially proposed a quantity ratio of 20-to-1, which was to be achieved by raising the thresholds for crack and maintaining the thresholds for powder.⁷⁹ Despite some interest in revising the law, Congress did not respond to the Commission’s recommendation,⁸⁰ and has still not

⁷² See, e.g., U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 9 (1997) (“The Sentencing Commission thereby recommends that Congress revise the federal statutory penalty scheme for both crack and powder cocaine offenses. . . . After Congress has evaluated our recommendations and expressed its views, the Commission will amend the guidelines to reflect congressional intent.”); U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii (2002) (recommending that Congress change the mandatory minimum threshold for crack and then direct the Commission to modify the guidelines).

⁷³ U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997).

⁷⁴ *Id.* Vice-Chairman Michael S. Gelacak wrote a concurring opinion in which he acknowledged that Congress directed the Commission to propose punishing crack more severely than powder but reiterated his view that the Commission’s 1995 proposal was better. In addition, the Commission argued that the current approach was “a little like punishing vehicular homicide while under the influence of alcohol more severely if the defendant had become intoxicated by ingesting cheap wine rather than scotch whiskey.”

⁷⁵ U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY v (2002).

⁷⁶ See Elizabeth Tison, Comment, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio is not as “Cracked” up as Some Suggest*, 27 S. ILL. U. L.J. 413, 428 (2003).

⁷⁷ U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002).

⁷⁸ *Id.* at v-viii.

⁷⁹ *Id.* at viii.

⁸⁰ Senators Hatch and Sessions introduced a bill in December 2001 that would have adopted a 20-to-1 ratio, but it never made it out of committee. Ryan S. King & Marc Mauer, *Sentencing with Discretion: Crack Cocaine Sentencing After Booker*, 18 FED. SENT. REP. 134, 139 (2006). There have also been other failed efforts to narrow the disparity. Paul G. Cassell,

acted. As such, the 1980's 100-to-1 quantity ratio in the statutory mandatory penalties and the guidelines survives to this day.

D. THE SUPREME COURT ROCKS THE SENTENCING WORLD

The sentencing status quo seemed stable. By the mid-1990s, the courts had turned back constitutional challenges (based on the Fifth and Eighth Amendments) to the crack/powder differential. The courts of appeal had also rejected sporadic district court efforts to reduce the disparity through guideline departures in the wake of the Commission's post-1995 position against the disparity.⁸¹ Furthermore, Congress seemed to be in no mood to deviate from the decisions it made in the mid-1980s. This was all within the context of the more mandatory federal sentencing guidelines, which relied upon extensive judicial fact-finding. Yet, this sentencing stability would not last.

Over a five-year span, the Supreme Court gave new life to the Sixth Amendment concerning the jury's role in determining certain sentencing facts—facts that had previously been decided by a judge.⁸² Absent a defendant's guilty plea, juries must generally find all factual elements necessary for conviction beyond a reasonable doubt.⁸³ Starting in the late 1990s, the Supreme Court issued several opinions exploring the sentencing dimensions of this idea. The Supreme Court first concluded, in *Almendarez-Torres v. United States*, that a defendant's recidivism—which would authorize a longer term of incarceration—was not an element of the offense and could be determined by the judge at sentencing.⁸⁴

In *Apprendi v. New Jersey*, however, the Supreme Court held that every fact that increases a defendant's maximum potential sentence, other than the fact of a prior conviction, must be admitted by the defendant or proven to a jury beyond a reasonable doubt.⁸⁵ In *Apprendi*, a hate crime law increased the statutory maximum from ten to twenty years if the judge determined that the crime was committed with the in-

Statement of Judge Paul G. Cassell, Chairman, Committee on Criminal Law before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives 65 n.178, available at <http://www.uscourts.gov/testimony/Cassell031606.pdf> (Mar. 16, 2006).

⁸¹ See, e.g., *United States v. Banks*, 130 F.3d 621 (4th Cir. 1997); *Anderson*, 82 F.3d 436. But see *id.*, at 445–50 (Wald, J., dissenting).

⁸² What follows is just a thumb-nail sketch of the Supreme Court's actions in this area. A more detailed and nuanced examination of these cases is beyond the scope of this Article. For a more in-depth discussion, see, e.g., *Reconceptualizing Sentencing*, *supra* note 13; *The Next Era*, *supra* note 1, at 377.

⁸³ See, e.g., *United States v. Gaudin*, 515 U.S. 506, 511 (1990); *In re: Winship*, 397 U.S. 358, 364 (1970).

⁸⁴ 523 U.S. 224, 227 (1998).

⁸⁵ 530 U.S. 466, 476, 490 (2000).

tent to intimidate on the basis of, among other things, race.⁸⁶ The Supreme Court held that the jury had to make this factual determination about racial animus because it increased the statutory maximum.⁸⁷ The lower courts, in the wake of *Apprendi*, limited this holding to the traditional, legislatively enacted statutory maximum.⁸⁸ However, the possibility existed that the Supreme Court would take it further. Would, for example, the Supreme Court extend *Apprendi* and invalidate the federal sentencing guidelines?

The initial indication from the Supreme Court was that the guidelines were safe. In *Harris v. United States*,⁸⁹ a thin and precarious majority of the Court held that *Apprendi* did not destroy mandatory minimum sentencing regimes in which the judge determined the crucial fact, such as the presence of a gun, by a preponderance of the evidence:

As long as the fact that triggered the mandatory minimum did not increase the statutory maximum, which many, if not most, courts and commentators understood to be the maximum punishment available according to the legislature for the offense of conviction, *Apprendi* did not require the fact to be found by the jury beyond a reasonable doubt.⁹⁰

This seemed to mean that the federal sentencing guidelines were on solid ground. Federal judges could keep making factual findings about such things as the weight of drugs involved in a crime, and keep following the restrictive sentencing guidelines as long as the sentence did not exceed the frequently high (i.e., twenty years) maximum punishment for the offense of conviction established by Congress.

Then came *Blakely v. Washington*.⁹¹ Justice Scalia, writing for a 5-4 majority, expanded *Apprendi* by redefining the term “statutory maximum.”⁹² The *Blakely* Court held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the*

⁸⁶ *Id.* at 468–69.

⁸⁷ The Supreme Court applied this rationale to capital sentencing in *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (“The right to a trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.”).

⁸⁸ *See, e.g., Smith*, 223 F.3d at 565.

⁸⁹ 536 U.S. 545 (2002).

⁹⁰ *The Next Era*, *supra* note 1, at 402.

⁹¹ 542 U.S. at 296.

⁹² *See, e.g., Booker*, 375 F.3d at 514 (“*Blakely* redefined ‘statutory maximum.’”); Goldsmith, *supra* note 17, at 952 (“*Blakely*, however, subsequently transformed the meaning of the term ‘statutory maximum.’”).

defendant."⁹³ Justice Scalia went on to state that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."⁹⁴ As such, the *Blakely* Court reversed that defendant's sentence because the judge made factual findings to increase the guidelines sentence despite the fact that the sentence was still below the maximum potential punishment authorized by the Washington state legislature.

Near pandemonium followed. The federal courts were divided over what would happen to the federal sentencing guidelines.⁹⁵ Justice Scalia had avoided the issue in his now famous *Blakely* footnote 9: "The Federal Guidelines are not before us, and we express no opinion on them."⁹⁶

E. THE OTHER SHOE DROPS . . . AND THEN BOUNCES

The Supreme Court decided the fate of the federal sentencing guidelines in *United States v. Booker*,⁹⁷ which ironically enough was a crack case. The Court produced a fractured decision with six opinions, including two, almost dueling 5-4 majorities. One majority, written by Justice Stevens, can be viewed as the "merits majority," while the other majority, written by Justice Breyer, can be viewed as the "remedial majority." Only Justice Ginsburg signed on to both majorities, and she wrote no opinion to clarify her rationale.

The merits majority held that *Blakely* applies to the federal sentencing guidelines.⁹⁸ Central to that holding was the premise that the federal sentencing guidelines were "mandatory and impose[d] binding requirements on all sentencing judges."⁹⁹ If the guidelines were simply advisory, the merits majority wrote, then the sentencing judge would not have to find any facts before imposing a sentence above the guidelines.

⁹³ 542 U.S. at 303–04 (emphasis in original).

⁹⁴ *Id.* (emphasis in original).

⁹⁵ See, e.g., *Humphress v. United States*, 398 F.3d 855, 861 (6th Cir. 2005) (noting, in the context of a post-conviction petition, that "the federal judiciary has been deeply divided on the issue of whether the rule announced in *Blakely* applies to the Federal Guidelines . . .").

⁹⁶ *Washington*, 542 U.S. at 305 n.9. The majority's refusal to address the federal sentencing guidelines drew a rebuke from Justice Breyer writing in dissent:

Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court's view.

Blakely v. Washington, 542 U.S. 296, 347 (2004) (Breyer, J., dissenting).

⁹⁷ 543 U.S. 220 (2005).

⁹⁸ 543 U.S. at 233 (merits majority).

⁹⁹ *Id.*

“The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.”¹⁰⁰ The merits majority singled out 18 U.S.C. § 3553(b)(1) as a prime reason why the federal sentencing guidelines violate the Constitution.¹⁰¹

Justice Stevens of the merits majority went on to note that the jury convicted Mr. Booker of possessing at least 50 grams of crack (the trigger point for the 10-year mandatory minimum), based on trial evidence that Mr. Booker had carried 92.5 grams of crack in a duffel bag. This yielded a guidelines range of 210 to 262 months.¹⁰² However, there was more:

[The sentencing] judge found facts beyond those found by the jury: namely, that Booker possessed 566 grams of crack in addition to the 92.5 grams in his duffel bag. The jury never heard any evidence of the additional drug quantity, and the judge found it true by a preponderance of the evidence. Thus, just as in *Blakely*, “the jury’s verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.”¹⁰³

Thus, the merits majority refused to distinguish between the Washington state guidelines at issue in *Blakely* and the federal sentencing guidelines. The Supreme Court accordingly held that the then-existing, mandatory federal sentencing guidelines violated the Constitution. The task of outlining what was to follow fell to the remedial majority.

Justice Breyer, writing for the remedial majority, held that the proper remedy would be to sever the mandatory parts of the underlying legislation, the SRA.¹⁰⁴ The remedial majority, comprised of the dissenters to the merits majority plus Justice Ginsburg, excised 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e), a provision concerning appellate review, which the Court felt “depend[ed] upon the Guidelines’ mandatory nature,”¹⁰⁵ from the SRA. Thus, the remedial majority declared that the federal sentencing guidelines were “effectively advisory.”¹⁰⁶ In doing so, the remedial majority chose to sever the mandatory portions of the SRA instead of requiring a jury to make all of the factual findings as the remedial dissent would have preferred.¹⁰⁷ The

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 234.

¹⁰² *Id.* at 235. Pursuant to USSG § 2D1.1, between 50 and 150 grams of crack produces the same guidelines offense level of 32.

¹⁰³ *Id.* at 235.

¹⁰⁴ 543 U.S. at 245-46, 259 (remedial majority).

¹⁰⁵ *Id.* at 245.

¹⁰⁶ *Id.*

¹⁰⁷ 543 U.S. at 272-74 (Stevens, J., dissenting as to remedy).

remedial majority focused on what it viewed as “Congress’ basic statutory goal— a system that diminishes sentencing disparity”¹⁰⁸ The practical impact of the new “effectively advisory” system remains elusive.

Justice Breyer noted that, even without § 3553(b)(1), the SRA provides guidance for sentencing judges:

The [SRA] nonetheless requires judges to consider the Guidelines “sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,” § 3553(a)(4)(A), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7). And the [SRA] nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2).¹⁰⁹

Furthermore, the remedial majority’s nonmandatory federal sentencing system still provides for appeals, but it does so under a “reasonableness” standard of review.¹¹⁰

Booker created a new guideline scheme.¹¹¹ It maintained the federal sentencing guidelines and judicial fact-finding, but made those guidelines (for which the facts are found) “effectively advisory.” District judges are now directed to § 3553(a) which requires them to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in”¹¹² § 3553(a)(2), which contains a laundry list of sentencing standards, including the guidelines themselves. So, at long last, the SRA’s § 3553(a) provisions are truly in play. Section 3553(a) now provides the guiding principles for sentencing courts. But what weight should the various components of § 3553(a) carry and what happens when they conflict?¹¹³

¹⁰⁸ 543 U.S. at 250 (remedial majority).

¹⁰⁹ *Id.* at 259–60 (remedial majority) (citations omitted).

¹¹⁰ *Id.* at 260–65 (remedial majority).

¹¹¹ *Cf. Reconceptualizing Sentencing, supra* note 13 at 42 (noting that *Booker* “effectively gutted a federal guidelines sentencing system twenty years in the making.”).

¹¹² 18 U.S.C. § 3553(a) (2004).

¹¹³ In the introduction to the remedial majority, Justice Breyer provides the following summary of the post-*Booker* system: “It requires a sentencing court to consider Guidelines ranges. . . but it permits the court to tailor the sentence in light of other statutory concerns as well. . . .”

There has been no definitive answer to this complex problem.¹¹⁴ Some courts and the Sentencing Commission believe that the guidelines are still entitled to “heavy weight”¹¹⁵ or “substantial weight,”¹¹⁶ in large part because the Commission has already worked to integrate and balance the § 3553(a) factors.¹¹⁷ Other courts now refuse to “uncritically apply the guidelines,”¹¹⁸ both because they believe that, “under *Booker*, courts must treat the guidelines as just one of a number of sentencing factors,”¹¹⁹ and because the guidelines can, at times, “clash with § 3553(a)’s primary directive: to impose a sentence sufficient, but not greater than necessary to comply with the purposes of sentencing.”¹²⁰ This latter instruction is often called the “parsimony principle.”

The courts of appeals have a different role post-*Booker*. Appellate courts review the sentence imposed for “reasonableness.” But what is a “reasonable” sentence? The meaning of that term is far from clear, a point that was emphasized by Justice Scalia in his remedial dissent.¹²¹ No court has held that a sentence following the guidelines is reasonable per se (or that a sentence outside of the guidelines is unreasonable per se) because doing so would unconstitutionally resurrect the mandatory guidelines system that *Booker* destroyed.¹²²

543 U.S. at 245–46. Should this be read as putting a thumb on the scale in favor of the guidelines when calculating a sentence post-*Booker*? Justice Breyer provides no answers but it is language that some might point to in favor of giving the guidelines a sort of first-among-equals status within the § 3553(a) framework. However, § 3553(a) itself confers no such benefit on the guidelines.

¹¹⁴ Functionally, it seems as though district court judges must still find facts by a preponderance of the evidence and then calculate and consider the applicable guidelines range. See *United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005). This is the only way that the guidelines can be properly “considered” pursuant to § 3553(a)(4), regardless of the weight assigned.

¹¹⁵ *United States v. Wilson*, 350 F. Supp. 2d 910, 912 (D. Utah 2005).

¹¹⁶ Ricardo H. Hinojosa, Prepared Statement of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission before the Subcommittee on Crime, Terrorism, and Homeland Security 2 (Mar. 16, 2006), http://www.ussc.gov/booker_report/03_16_06Booker%20Testimony.pdf.

¹¹⁷ See, e.g., *Wilson*, 350 F. Supp. 2d at 916 (“Even apart from congressional approval of the Guidelines, considerable evidence suggests that Guidelines sentences serve the congressionally-mandated purposes of punishment.”).

¹¹⁸ *United States v. Ranum*, 353 F. Supp. 2d 984, 985 (E.D. Wis. 2005).

¹¹⁹ *Id.* at 985–86.

¹²⁰ *Id.* at 986 (citation omitted).

¹²¹ 543 U.S. at 311–12 (Scalia, J., dissenting).

¹²² See, e.g., *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005) (“Because “reasonableness” is inherently a concept of flexible meaning, generally lacking precise boundaries, we decline to fashion any per se rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline. Indeed, such per se rules would risk being invalidated as contrary to the Supreme Court’s holding in *Booker* . . . , because they would effectively re-institute mandatory adherence to the Guidelines.”).

As we can see, Justice Breyer's remedial majority left many questions unanswered and prompted even more puzzles.¹²³ Indeed, as of late spring 2006, the operational details of the post-*Booker* federal sentencing guidelines remain murky. The full contours of this debate are well beyond the scope of this article. However, the conflict over how to deal with crack cocaine post-*Booker* presents special concerns that lie in the netherworld between the guidelines, the courts, and Congress. It is here where we find sentencing's latest Gordian Knot.

II. *BOOKER ON CRACK: WHAT WILL IT BRING?*

After years of political controversy but relative legal stability, the question of the 100-to-1 quantity ratio for powder and crack cocaine is squarely in front of district and appellate courts. The comparatively easy question in the post-*Booker* world is whether an *individual* defendant—be it in a crack case or not—could get a sentence that varies from the guidelines. Section 3553(a) would seem to clearly allow for variations from the guidelines based on individual circumstances of the offense and the offender.¹²⁴ At the categorical level, however, the crack versus powder quantity differential for sentencing is both more complicated and more contested. Post-*Booker* confusion is the product of a tangled web of congressional action and previous judicial interpretations that hold the differential to be neither unconstitutional nor a valid ground to depart from the then more-mandatory guidelines.

A. IS *BOOKER* A MAGIC BULLET FOR DEFENDANTS?

Booker can be different things to different people. Is *Booker* a magic bullet for crack defendants hoping to slay the 100-to-1 quantity ratio in the guidelines? Some, but not all,¹²⁵ district courts think so. Of course, *Booker* cannot authorize a district judge to sentence below the

¹²³ See *Reconceptualizing Sentencing*, *supra* note 13, at 42–43.

¹²⁴ Apparently, both the government and defendants agree that judges can properly impose a nonguidelines sentence on the basis of such individualized circumstances. See, e.g., Brief for Amici American Civil Liberties Union Foundation, et al., *United States v. Ricks*, No. 05-4833, 5–8 (3d Cir. 2006).

¹²⁵ See, e.g., U.S. SENT'G COMM'N, FINAL REPORT ON THE IMPACT OF *United States v. Booker* on Federal Sentencing i, x (2006) (reporting that “[c]ourts do not often appear to be using *Booker* or the factors under 18 U.S.C. § 3553(a) to impose below-range sentences in crack cocaine cases. Courts do not often explicitly cite crack cocaine/cocaine powder sentencing disparity as a reason to impose below-range sentences in crack cocaine cases.”); *id.* at 129 (reporting that after *Booker* “84.8% of crack cases were sentenced in conformance with the guidelines (including government-sponsored departures)” and that “crack cocaine offenses are sentenced in conformance with the guidelines at about the same rate as all other drug types”). But see *United States v. Perry*, 389 F. Supp. 2d 278, 304 (D. R.I. 2005) (“This Court’s conclusion that a non-Guideline sentence is called for is also supported by the vast majority of district courts that have evaluated the crack/powder cocaine sentencing disparity in the wake of *Booker* . . .”).

statutory mandatory minimum provisions set by Congress, but it can allow judges to impose sentences that deviate from the recommendation of the advisory guidelines.

Several district courts have used their new post-*Booker* authority to determine that the 100-to-1 ratio is inappropriate in all cases and to impose a sentence that is less severe than called for by the guidelines.¹²⁶ For example, some judges have adopted a 10-to-1 ratio,¹²⁷ while others have gone with a 20-to-1 ratio.¹²⁸ These decisions are often based on arguments that the guidelines' recommendation (1) lacks persuasive evidence of rationality and thus overstates the seriousness of crack offenses; and/or (2) results in unwarranted disparity that often correlates with race.¹²⁹ Thus, at a categorical level in several district courts, *Booker* is a magic bullet for defendants. Yet, it may not be so simple.

Some district courts argue that the 100-to-1 quantity ratio in the guidelines does not appropriately "reflect the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment for the offense,"¹³⁰ as required under § 3553(a)(2)(A), and point in support to the Commission's repudiation of the ratio.¹³¹ To that end, courts have concluded that "none of the previously offered reasons for the 100:1 ratio withstand scrutiny."¹³² Judge Adelman, an active and thoughtful participant in the national sentencing discussion, has held that "the disparity in sentences involving crack and powder brings irrationality and possibly harmful mischief into the criminal justice system."¹³³ Another judge stated plainly that "there is no rational basis in terms of pharmacological differences, public opinion, or related violence to distinguish crack co-

¹²⁶ See, e.g., *United States v. Fisher*, No. S3 03 CR 1501 SAS, 2005 WL 2542916 (S.D.N.Y. Oct. 11, 2005); *Perry*, 329 F. Supp. 2d 278; *United States v. Leroy*, 373 F. Supp. 2d 887 (E.D. Wis. 2005); *Simon*, 361 F. Supp. 2d 35; *Smith*, 359 F. Supp. 2d 771.

¹²⁷ See, e.g., *Fisher*, No. S3 03 CR 1501 SAS, 2005 WL 2542916, at *6.

¹²⁸ See, e.g., *United States v. Stukes*, No. 03 CR.601(RWS), 2005 WL 2560224, at *2 (S.D.N.Y. Oct. 12, 2005); *Leroy*, 373 F. Supp. 2d at 893; *United States v. Castillo*, No. 03 CR. 835(RWS), 2005 WL 1214280, at *5 (S.D.N.Y. May 20, 2005).

¹²⁹ See, e.g., *Leroy*, 373 F. Supp. 2d at 892; *Simon*, 361 F.Supp.2d at 49 (noting that the guidelines range "substantially overste[d] the seriousness of the offense, particularly when compared with offenses involving comparable quantities of powder cocaine."); Some district judges—perhaps confusing their role with that of the appellate court—declare a sentence consistent with the advisory guidelines to be "unreasonable." See, e.g., *Simon*, 361 F.Supp.2d at 46; *Fisher*, No. S3 03 CR 1501 SAS, 2005 WL 2542916, at *7; *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243, at *1, 6 (E.D. Tenn. May 6, 2005).

¹³⁰ 18 U.S.C. § 3553(a)(2)(A) (2000).

¹³¹ See, e.g., *Perry*, 329 F. Supp. 2d at 302 ("Review of the Sentencing Commission reports leaves little doubt that the Guidelines' penalties for crack lack any principled justification that can withstand scrutiny under § 3553.")

¹³² *Smith*, 359 F. Supp. 2d at 780; see also *Leroy*, 373 F. Supp. 2d at 892.

¹³³ *Smith*, 359 F. Supp. 2d at 780.

caine from powder cocaine at a ratio of one being one hundred times worse than the other.”¹³⁴

While (virtually) no one today defends the 100-to-1 quantity ratio as wise policy,¹³⁵ the claims of *irrationality* seem odd. In the pre-*Booker* world, courts of appeal continued to defend the constitutionality of the 100-to-1 ratio even after the Sentencing Commission's report challenged the wisdom—and, according to some, the rational basis—of Congress's and the Commission's choices.¹³⁶ If the ratio was sufficiently rational to withstand a constitutional attack, one would think that it has to have at least *some* merit.

More broadly, few, if any,¹³⁷ of the district courts that have made categorical determinations not to follow the guidelines' 100-to-1 ratio have focused on the impact of the congressional mandatory punishments on the § 3553(a) analysis.¹³⁸ These courts properly concluded, sometimes despite the government's protestations, that sentencing judges must consider all aspects of § 3553(a) and not just the individual circumstances of the offense or the offender. Yet this judicial consideration must still respect congressional will as expressed through the mandatory minimum statutes.¹³⁹ This plays out most noticeably in the provisions of § 3553 that deal with the seriousness of the offense and the need to avoid unwarranted disparity.¹⁴⁰

In applying § 3553(a)(2)(A) concerning “the need for the sentence imposed . . . to reflect the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment for the offense,” the sentencing judge should evaluate the seriousness of this *type* of offense.¹⁴¹

¹³⁴ *Fisher*, No. S3 03 CR 1501 SAS, 2005 WL 2542916, at *4 (citation omitted).

¹³⁵ See also *supra* note 55.

¹³⁶ See, e.g., *United States v. Jackson*, 84 F.3d 1154, 1161 (9th Cir.1996) (“We do not agree that the Commission's report, or Congress's decision to reject it, affects the precedential value of our ruling that Congress had a rational basis for the 100:1 ratio.”); *United States v. Peterson*, 143 F. Supp. 2d 569 (E.D. Va. 2001) (rejecting constitutional and statutory challenges and denying downward departure).

¹³⁷ The court in *Fisher*, No. S3 03 CR 1501 SAS, 2005 WL 2542916, at *1, at least noted “the tension between a mandatory minimum sentence and a non-Guidelines sentence,” although it did not examine the role of the mandatory in interpreting § 3553(a).

¹³⁸ See, e.g., *United States v. Leroy*, 373 F. Supp. 2d 887, 892 (E.D. Wis. 2005) (rebuffing government objection by noting that the sentence imposed was not below the required statutory minimum).

¹³⁹ Cf. Brief for Amici American Civil Liberties Union Foundation, et al. as Amici Curiae supporting Appellant at 12, *Starks v. United States*, No. 05-10219, 2006 WL 1877196 (9th Cir. 2006) (“Of course, amici agree that Congress's will should be respected, but the discernment of that will must be drawn from, and limited to, what is duly and currently expressed through statute.”). The guidelines do not warrant the same deference. Pursuant to § 3553(a) and *Booker*, the guidelines are but one factor of many for a judge to consider.

¹⁴⁰ 18 U.S.C. § 3553(a)(2)(A), (a)(6) (2000).

¹⁴¹ See, e.g., Brief for Amici American Civil Liberties Union Foundation, et al. as Amici Curiae supporting Appellee at 4, *United States v. Castillo*, No.05-3454-cr, 2006 WL

Despite the apparent view of the United States, this provision is not limited to an evaluation of the seriousness of this individual manifestation of the offense.¹⁴² A contrary construction would inappropriately make § 3553(a)(1), which addresses the “nature and circumstances of the offense,” redundant.¹⁴³ Courts can disagree with the Commission’s perspective even though Congress generally acquiesced to the Commission’s guidelines.¹⁴⁴ After all, *Booker* made the guidelines “effectively advisory.”¹⁴⁵ Thus, for example, a judge might conclude that the fraud guidelines are too severe, in part because the true seriousness of fraud offenses is not accurately captured through the guidelines’ heavy focus on amount of loss.¹⁴⁶

However, reaching a similarly broad conclusion in a crack or powder cocaine case is much tougher. Congress has affirmatively indicated that the offense of trafficking in five grams of crack or five hundred grams of powder is sufficiently serious such that the *minimum* punishment is five years, and that trafficking in 50 grams of crack or 5,000 grams of powder is sufficiently serious such that the *minimum* punishment is ten years.¹⁴⁷ How do these congressional determinations influ-

2374281(2d Cir. Feb. 17, 2006) (“Nothing in *Booker* suggests that the holding there merely allows the judge to consider unusual factors particular to that crime or defendant—quite the opposite”); Brief for Amici American Civil Liberties Union Foundation, et al. as Amici Curiae supporting Appellant at 11, *Starks v. United States*, No. 05-10219, 2006 WL 1877196 (9th Cir. June 12, 2006); Brief for Amici American Civil Liberties Union Foundation, et al. as Amici Curiae supporting Appellee at 8, *United States v. Ricks*, 96 Fed. Appx. 96, (3d Cir. May 18, 2006) (No. 05-4833).

¹⁴² Brief for Amici, *Starks v. United States*, *supra* note 139, at 4–5 (quoting and describing the government’s position).

¹⁴³ *See, e.g., id.* at 4-5, 9.

¹⁴⁴ 28 U.S.C. § 994(p) (2000); *United States v. Leroy*, 373 F.Supp.2d 887, 892 n.6 (E.D. Wis. 2005) (noting that the guidelines automatically take effect unless Congress acts to stop them). Congress did directly amend the guidelines in a few areas unrelated to cocaine sentencing.

¹⁴⁵ *See* Brief for Amici, *United States v. Castillo*, *supra* note 141, at 10 (“The government claims that a court cannot refuse to follow a guideline range based primarily or only upon the harshness of that guideline. To accept their position would return us to a system of sentences devoid of significant judicial discretion outside of the determination of individualized factors relating specifically to that crime and that defendant. This is exactly the construct that was overturned in *Booker*.”).

¹⁴⁶ *Cf.* *United States v. Emmenegger*, 329 F. Supp. 2d. 416, 427 (S.D.N.Y. 2004) (“The Guidelines place undue weight on the amount of loss involved in the fraud. This is certainly a relevant sentencing factor: All else being equal, large thefts damage society more than small ones, create a greater temptation for potential offenders, and thus generally require greater deterrence and more serious punishment. But the guidelines provisions for theft and fraud place excessive weight on this single factor, attempting—no doubt in an effort to fit the infinite variations on the theme of greed into a limited set of narrow sentencing boxes—to assign precise weights to the theft of different dollar amounts.”); *cf. id.* (“In many cases, including this one, the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.”).

¹⁴⁷ 21 U.S.C. § 841 (2000).

ence the § 3553(a) analysis? Perhaps these congressionally set mandatory minimum statutes limit the ability of a district court to conclude that a punishment *comparable and related* to the mandatory minimum violates this part of the SRA. Perhaps the existence of a similar mandatory minimum demonstrates that the guidelines actually do satisfy the command of § 3553(a)(2)(A) to properly “reflect the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment for the offense.”¹⁴⁸ Congress has made a judgment that is, at the very least, closely related to the question at issue in § 3553(a)(2)(A). Congress expressed itself with great specificity in the Anti-Drug Abuse Act of 1986, and differentiated those mandatory punishments solely by physical weight. It would be puzzling indeed—and arguably contrary to the will of Congress—to conclude that offenses involving quantities of crack below, between, or above the two mandatory minimum triggers warrant punishments entirely disconnected from the relevant mandatory levels.¹⁴⁹

Additionally, the question of disparity is especially important when judges are categorically rejecting the 100-to-1 quantity ratio.¹⁵⁰ Section 3553(a)(6) instructs sentencing courts to avoid “unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”¹⁵¹ The meaning and application of that provision has been the subject of much discussion.¹⁵² The Commission has stated that “[u]nwarranted disparity is defined as different treatment of individual offenders who are similar in relevant ways, or similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing.”¹⁵³

Parsing § 3553(a)(6) in the crack/powder context requires us to ask (1) whether crack and powder trafficking is similar conduct, and, if so,

¹⁴⁸ 18 U.S.C. § 3553(a)(2)(A) (2000).

¹⁴⁹ See, e.g., *Doe*, 412 F. Supp. 2d at 91 (“The Court is obligated to construe the factors in section 3553(a) in a manner that is consistent with other relevant statutory provisions, particularly those that define criminal offenses.”); *Id.*, at 95 (noting that “courts must give [§ 3553] a meaning that is consistent with other statutory pronouncements (particularly more specific legislative enactments, such as those that prescribe crack and powder-cocaine penalties.)”) (citing *Norwest Bank Minnesota Nat’l Ass’n v. FDIC*, 312 F.3d 477, 451 (D.C. Cir. 2002) (“When both specific and general provisions cover the same subject, the specific provision will control, especially if applying the general provision would render the specific provision superfluous . . .”).

¹⁵⁰ *United States v. Fisher*, No. S3 03 CR 1501 SAS, 2005 WL 2542916, at *9 (S.D.N.Y. Oct. 11, 2005) (“Avoiding sentencing disparity is particularly important when a court imposes a non-Guidelines sentence.”); *Simon*, 361 F. Supp. 2d at 48 (same);

¹⁵¹ 18 U.S.C. § 3553(a)(6) (2000).

¹⁵² See, e.g., Michael O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006).

¹⁵³ U.S. SENT’G COMM., FIFTEEN YEARS OF GUIDELINES SENTENCING 113 (2004).

(2) whether the disparity is warranted.¹⁵⁴ It seems that crack and powder trafficking convictions, which relate to different forms of the same drug, are indeed similar.¹⁵⁵ Thus, the question then turns to one of justification.¹⁵⁶ Is the difference between crack sentences and powder sentences warranted?

By adopting the mandatory minimum penalties, Congress specifically determined the differential is “warranted” at the five grams of crack/500 grams of powder and 50 grams of crack/5,000 grams of powder levels.¹⁵⁷ It is difficult then to see why the differential would not be warranted at other levels. The “magic bullet” courts cannot easily turn to the Commission for support here. Although the Commission has strongly objected to the 100-to-1 ratio and set forth compelling reasons to believe it is a poor policy choice by Congress, the Commission has never recommended changing the guidelines without first (or at least simultaneously) modifying the mandatory minimum provisions. Thus, despite some claims to the contrary,¹⁵⁸ the district courts that have adopted the 20-to-1 ratio are not really adopting the Commission’s recommendation because they have no power to do so.¹⁵⁹

Finally, what about the disparity *created* by significant judicial overrides of the recommended 100-to-1 ratio in the guidelines? Of course, the *Booker* court knew that there would be more disparity under this “effectively advisory” system.¹⁶⁰ However, this unavoidable disparity resulting from loosening the more-mandatory reins of the former guidelines is exacerbated by, for example, district judges in the same

¹⁵⁴ See Michael O’Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) after Booker*, 36 MCGEORGE L. REV. (forthcoming 2006) (available at <http://ssrn.com/abstract=871246>).

¹⁵⁵ *Id.* at 16, 22.

¹⁵⁶ See, e.g., *id.* at 20, 19 (encouraging courts to look to “the national average sentence imposed in other cases in which a defendant with a similar record was convicted of the same or similar offense” and minimize unwarranted deviations from the average.)

¹⁵⁷ 21 U.S.C. § 841 (2000).

¹⁵⁸ See, e.g., *United States v. Beamon*, 373 F. Supp. 2d 878, 886 (E.D. Wis. 2005) (“Therefore, consistent with the Sentencing Commission’s latest recommendation on the issue, in *Smith*, I followed a 20:1 crack-to-powder ratio rather than the 100:1 ratio contained in the guidelines.”).

¹⁵⁹ Judicial views of disparity can appear to shift depending on the context. Judge Adelman has used his authority post-*Booker* to deploy the 20-to-1 ratio in several reported cases. See, e.g., *United States v. Beamon*, 373 F. Supp. 2d 878 (E.D. Wis. 2005). In doing so, he has criticized the 100-to-1 quantity ratio in the guidelines as exacerbating disparity in violation of § 3553(a)(6). *Id.* at 887. In a gun and heroin case, however, Judge Adelman seems to point to the Commission’s effort to track the drug mandatory minimum statute (the source of the 100-to-1 ratio) as a positive thing and contrasts it to the firearm guidelines where he felt that the “Commission basically gave up on attempting to incorporate the mandatory minimum into the guidelines and thereby minimize the distortion in penalties created by Congress’s interjection of a mandatory minimum into a guideline sentencing regime.” *United States v. Alexander*, 381 F. Supp. 2d 884, 886–887 (E.D. Wis. 2005).

¹⁶⁰ *Booker*, 543 U.S. at 245.

courthouse applying substantially different crack/powder quantity ratios as a matter of policy. Perhaps even this is to be expected in the post-*Booker* world. But when a district judge categorically adopts a 20-to-1 quantity ratio, she is introducing a wholly different form of arguably unwarranted disparity. Again, because of the mandatory statutory punishments, the judge is creating *intra-judge* disparity.

Booker does not allow judges to ignore the statutory mandatory minimum sentences of five and ten years. Without the current guideline integration of those penalties—however unwise they may be—a new form of disparity emerges. Imagine a judge who adopts a 20-to-1 ratio solely by lowering the crack sentences. Of course, the mandatory penalties will still apply. Now imagine two defendants with identical records and backgrounds, both with a previous conviction, and both of whom have been convicted by a jury for crack cocaine trafficking. One defendant trafficked in 50 grams while the other trafficked in 49.9 grams. At the 20-to-1 ratio, both offenders would face an advisory guidelines calculation of 70-87 months.¹⁶¹ The statutory mandatory, however, intervenes. The 50 gram dealer would get the statutory mandatory minimum of 120 months while the 49.9 dealer could get more than four years less.¹⁶² This is often referred to as a sentencing “cliff.” “A cliff arises where a trivial change in quantity has a substantial effect on sentences.”¹⁶³ While reasonable minds can differ, it is certainly arguable that this is a serious problem. By trying to reduce disparity between crack and powder cocaine offenders, the judge who unilaterally adopts a 20-to-1 ratio is in fact *creating* more unwarranted disparity between crack offenders in her own courtroom.

Arguably, this disparity problem could be avoided by equalizing the ratio between crack and powder cocaine by raising the powder sentences. As one judge noted, “there is no plainly superior reason why a judge, using his or her newfound *Booker* discretion, ought to *lessen* the presumptive prison sentence for crack as opposed to *increasing* the presumptive prison sentence for powder cocaine.”¹⁶⁴ There would be no

¹⁶¹ Adopting a 20-to-1 ratio would put the crack penalty at the same level as either 1,000 grams of powder (for the 50 grams of crack) or 998 grams of powder (for the 49.9 grams of crack). The punishment for at least 500 grams but not more than 1,500 grams of powder cocaine is offense level 26. In Criminal History Category II, the resulting guidelines range is 70-87 months. United States Sentencing Commission, Guidelines Manual, §2D1.1(c) (Nov. 2005). If the same exercise is conducted with 4.9 vs. 5 grams, the resulting guidelines range for 4.9 grams of crack is 24-30 and for 5 grams of crack is 30-37. Again, the mandatory will kick in for the 5-gram defendant producing a sentence of 60 months while the 4.9-gram offender would be facing a guidelines sentence of no more than half of that amount.

¹⁶² See, e.g., *United States v. Pho*, 433 F. 3d 53, 63-64 (1st Cir. 2006) (discussing a similar calculation).

¹⁶³ U.S. SENT'G COMM., FIFTEEN YEARS OF GUIDELINES SENTENCING 50 (2004).

¹⁶⁴ *United States v. Tabor*, 365 F. Supp. 2d 1052, 1060 (D. Neb. 2005).

cliffs and, to the extent that crack and powder offenses should be treated similarly, there will be no disparity. Not surprisingly, this “solution” remains untried in the courts because few people believe that the punishment severity should be increased in this area.¹⁶⁵

Indeed, concerning severity, the “magic bullet” courts arguably have the parsimony principle¹⁶⁶ in their corner. The Sentencing Reform Act expressed a clear preference, albeit one that has frequently been observed in the breach, for the lowest sentence that satisfies the purposes of punishment expressed in § 3553(a). As Judge Adelman observed in a similar context: “When two sufficient and reasonable sentences are potentially applicable, the statute directs the court to choose the lesser one.”¹⁶⁷

At the district court level, sentencing judges must consider all of the § 3553(a) factors (including the guidelines), and attempt to distill from that information an appropriate sentence. While sentencing judges must evaluate the seriousness of the crack offense, among other factors, they cannot do so in a vacuum and without regard for congressional policy as expressed in the mandatory minimum statutes. In addition, while judges must also consider the statutory requirement to avoid unwarranted disparities, they cannot do so in a vacuum and without regard for the interaction between the sentence and Congress’s mandatory minimum statutes. Having to consider all these factors makes it difficult for a district judge to categorically dismiss the 100-to-1 ratio. Doing so could arguably yield an unreasonable sentence that warrants reversal.

Sentencing has always been a fearsome responsibility, but it is all the more challenging in the post-*Booker* environment. The impulse to correct a widely perceived wrong based on compelling evidence from an expert sentencing authority is hard to resist. If not for the mandatory minimum statutes, it would seem far simpler. However, the mandatory minimum statutes cannot be ignored, and the resulting tension is real.

B. IS *BOOKER* A MIRAGE FOR DEFENDANTS?

In a number of courts, *Booker* provides only a mirage for crack defendants. While some district judges have refused to diverge from the guidelines,¹⁶⁸ it has been the appellate courts that have stepped forward

¹⁶⁵ See, e.g., UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii (May 2002) (recommending that Congress “maintain the current statutory minimum threshold quantities for powder cocaine”).

¹⁶⁶ See *supra* note 120.

¹⁶⁷ *United States v. Carey*, 368 F. Supp. 2d 891, 895 n.4 (E.D. Wisc. 2005).

¹⁶⁸ See, e.g., *United States v. Tabor*, 365 F. Supp. 2d 1052, 1054 (D. Neb. 2005) (“Finding no plainly superior reason to do otherwise, I will apply the crack Guidelines and impose a prison sentence within the otherwise applicable Guideline range.”); *Doe*, 412 F. Supp. 2d at 87–89.

most forcefully to support the use of the 100-to-1 quantity ratio.¹⁶⁹ These courts, however, have also failed to fully grapple with the tension between congressional mandatory statutes and *Booker's* constitutional requirements. Unlike the “magic bullet” courts, the “mirage” courts side squarely with the 100-to-1 ratio and arguably run roughshod over the now advisory nature of the federal sentencing guidelines.

Appellate courts review sentences imposed for “reasonableness” in the context of the commands of § 3553(a).¹⁷⁰ In doing so, they should not be able to hide behind the guidelines as a proxy for reasonableness analysis. In fact, as I have written elsewhere, “[t]he *Booker* remedial majority opinion makes clear that sentences within the advisory Guidelines range are also subject to appellate review for reasonableness.”¹⁷¹ Yet, some appellate courts seem to be functionally evading *Booker*.

The First Circuit in *United States v. Pho*,¹⁷² for example, took a restrictive view of the power of sentencing judges in the post-*Booker* world, and rejected a district court’s arguably categorical adoption of a 20-to-1 crack/powder ratio.¹⁷³ In *Pho*, the government claimed that district judges in the post-*Booker* world can only make “individualized assessments regarding what punishment is warranted in a particular case.”¹⁷⁴ The Court of Appeals essentially adopted the government’s position and held that *Booker* discretion may “operate only within the ambit of the individualized factors spelled out in section 3553(a).”¹⁷⁵ Declaring that the district court made a “policy judgment, pure and simple,”¹⁷⁶

¹⁶⁹ See, e.g., *Pho*, 433 F. 3d at 54; *United States v. Eura*, 440 F. 3d 625, 627 (4th Cir. 2006).

¹⁷⁰ *Booker*, 543 U.S. at 259–60 (Breyer, J.) (remedial majority).

¹⁷¹ Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 180 (2005) [hereinafter *Guidance from Above and Beyond*] (citing Justice Breyer in *Booker*, who would allow reasonableness review of sentences both in and out of suggested Guidelines range).

¹⁷² 433 F. 3d 53.

¹⁷³ See *id.* at 62. Similarly, in a thoughtful opinion, Judge Kopf wrestled with his opposition to the 100-to-1 ratio and his desire to respect congressional will. See, *United States v. Tabor*, 365 F. Supp. 2d 1052, 1058 n.9 (D. Neb. 2005) (“To be clear, if I were the “King,” I would adopt the Sentencing Commission’s 2002 approach to crack cocaine. My disagreement with judges who use *Booker* to implement the Sentencing Commission’s views or some other approach is not primarily that their reasons are faulty in the abstract, but that they give insufficient deference to Congress’ contrary, but reasonable, policy preferences.”). Judge Kopf, however, is arguably subject to the same general criticism as the *Pho* court in that he is not giving enough deference to the Supreme Court’s constitutional commands in the *Booker* merits majority. See, e.g., *Fisher*, No. S3 03 CR 1501 SAS, 2005 WL 2542916, at *6 (asserting that the *Tabor* court “[has] failed to recognize that the Guidelines are not an act of Congress. Furthermore, they are no longer mandatory according to the Supreme Court’s decision in *Booker*.”).

¹⁷⁴ Brief of the United States, *United States v. Pho*, Nos. 05-2455 & 05-2461 43 (Nov. 2005).

¹⁷⁵ *United States v. Pho*, 433 F. 3d 53, 62 (citation omitted).

¹⁷⁶ *Id.*

the *Pho* court accused the sentencing judge of “usurp[ing] Congress’s judgment about the proper sentencing policy for cocaine offenses.”¹⁷⁷

One of the problems with *Pho* is that the court painted with too broad of a brush. The First Circuit could have reviewed the sentence for reasonableness by struggling with the interplay between the § 3553(a) factors and the congressional mandatory minimum statutes. While these factors are influenced by the existence of the mandatory minimum—as seen in the context of the “magic bullet” cases—district judges need to grapple with these conflicting commands in an effort to impose a sentence that follows the SRA and therefore honors the parsimony principle by being “sufficient, but not greater than necessary, to comply” with the § 3553(a)(2) purposes.¹⁷⁸ Yet the *Pho* court did not then engage in a stereotypical reasonableness analysis of the resulting sentence. Rather, it concluded that the sentence was unreasonable because the district court “committed legal error.”¹⁷⁹ This standard is not necessarily problematic, but it is hard to see what “law” the district court violated. The district court did not transgress the mandatory minimum punishment. It simply did not balance the § 3553(a) factors in the way that the First Circuit thought was appropriate. Such action may well yield an unreasonable sentence, but not because there was an error of “abstract law.”¹⁸⁰

Taking *Pho* to its logical conclusion, the guidelines themselves could become the touchstone of reasonableness in direct contravention of the *Booker* merits majority. In fact, the Commission was happy to endorse the views of the First Circuit as part of its effort to maintain some form of privileged status for the guidelines generally.¹⁸¹ Using similar language to that used in *Pho*, the Commission claimed that “in the post-*Booker* advisory guidelines scheme, a district court’s general disagreement with broad-based policies enunciated by Congress or the Commission, as its agent, cannot serve as the basis for sentencing outside the applicable guidelines range.”¹⁸² *Booker* does not allow this kind of sub-

¹⁷⁷ *Id.* at 63.

¹⁷⁸ 18 U.S.C. § 3553(a) (2000).

¹⁷⁹ *Pho*, 433 F. 3d at 59; see also *id.* at 60–61 (“[E]rrors of law render a sentence per se unreasonable, and appellate review of claimed errors of law is nondeferential (i.e., de novo.)”); cf. *United States v. Eura*, 440 F. 3d 625, 634 (4th Cir. 2006) (referring to the Commission’s recommendation to change the ratio as “impermissible factors” that “cannot be used as a basis to vary from the advisory sentencing range”); *United States v. Moreland*, 437 F. 3d 424, 434 (4th Cir. 2006) (“A sentence may be substantively unreasonable if the court relies on an improper factor or rejects policies articulated by Congress or the Sentencing Commission) (citations omitted).

¹⁸⁰ *Pho*, 433 F. 3d at 60 (quoting *Roger Edwards, LLC v. Fiddes & Son*, 427 F. 3d 129, 132 (1st Cir.2005)).

¹⁸¹ U.S. SENTENCING COMM’N, FINAL REP. ON THE IMPACT OF *United States v. Booker* on Fed. Sentencing 32–33 (March 2006).

¹⁸² *Id.* (citation omitted) (emphasis added); see also *Pho*, 433 F. 3d at 64–65 (1st Cir. 2006) (“This holding recognizes that sentencing decisions must be done case by case and must

servience to the Commission's guidelines.¹⁸³ The Commission is not the same as Congress. A guideline is not the same as a statute. Even the mandatory minimum statute merely informs rather than dictates the court's evaluation of the § 3553(a) factors.

Booker does not permit the "suspension of disbelief" school of sentencing in which courts rely solely on the guidelines regardless of their flaws. Some "mirage" courts are as quick to disregard the Commission's findings about the problems with the 100-to-1 ratio as some "magic bullet" courts were to embrace them. Yet, the Commission's analysis does matter, particularly when it is not in competition with a more explicit congressional directive embodied in mandatory minimum statutes. Arguably, *Booker* tells us to think of the guidelines as more like ordinary regulations subject to judicial testing and review.¹⁸⁴ Are the advisory guidelines sufficiently reasoned and supported?¹⁸⁵ In the absence of the mandatory minimum statutes, the Commission's own answer to that question is a resounding "no." Indeed, in a 1996 dissent to a D.C. Circuit opinion holding that a district judge had no authority to depart based on the 100-to-1 differential despite the Commission's initial report, Judge Wald observed:

[I]f this were a run-of-the-mill administrative law case, I predict that we would not hesitate for a moment to vacate an agency's legislative rule, if the agency itself admitted that the rule was arbitrary, capricious, unfair and violative of a federal statute, and then document that admission with credible evidence.¹⁸⁶

The idea of looking to the Administrative Procedures Act is one that has garnered a good amount of attention from serious sentencing scholars,¹⁸⁷ and warrants further exploration. However, as noted above, the interplay

be grounded in case-specific considerations, not in general disagreement with broad-cased policies enunciated by Congress or the Commission, as its agent.").

¹⁸³ It is also problematic that some appellate courts afford the guidelines privileged status by presuming that a sentence within the guidelines is reasonable. *See, e.g.*, *United States v. Cawthorn*, 429 F. 3d 793, 802 (8th Cir. 2006) ("When a defendant's sentence is within the Guidelines range it is presumptively reasonable.") (citation omitted); *United States v. Lister*, 432 F. 3d 754, 761 (7th Cir. 2005) (same).

¹⁸⁴ *Guidance from Above and Beyond*, *supra* note 171, at 181 (asserting that the post-*Booker* "ability to engage on a topic previously considered largely off-limits – whether the Guidelines themselves are reasonable – furthers the dialogue between the various sentencers and places sentencing closer to the familiar footing of most other rules and regulations.") (citations omitted).

¹⁸⁵ *Cf. Motor Vehicle Manufacturers Ass'n of the United States, Inc., v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 30–31 (1983)

¹⁸⁶ *Anderson*, 82 F. 3d at 450 (Wald, J., dissenting).

¹⁸⁷ *See, e.g.*, Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 *BUFF. CRIM. L. REV.* 723, 802–10 (1999).

between the Commission's analysis and the mandatory minimum sentencing scheme is problematic.

At times, it seems as though the "mirage" courts of appeals have forgotten about the merits majority in *Booker* and are living in a world before *Blakely* or *Booker*. The Fourth Circuit is a prime example. In 1997, the Fourth Circuit held in *United States v. Banks*¹⁸⁸ that it was impermissible for a district court to depart downward from the guidelines because of the crack/powder disparity.¹⁸⁹ "Because there was nothing atypical about this [individual] case, the district court erred in departing downward from the Sentencing Guidelines' range."¹⁹⁰ Of course, in 1997, the *Banks* Court could and did rely on the mandatory guidelines provision of § 3553(b),¹⁹¹ which Justice Breyer in the *Booker* remedial majority excised from the statute by constitutional necessity.¹⁹² Almost ten years later, in *United States v. Eura*,¹⁹³ the Fourth Circuit rejected a district court's categorical adoption of a 20-to-1 crack/powder ratio, and stated that to "warrant a variance from the advisory sentencing range[,] . . . a sentencing court must identify the *individual* aspects of the *defendant's* case that fit within the factors listed in § 3553(a) and, in reliance on those findings, impose a non-Guidelines sentence that is reasonable."¹⁹⁴ The similarity between the Fourth Circuit in 1997 and the Fourth Circuit in 2006 is both conspicuous and inappropriate. The slope backwards toward now-unconstitutional mandatory federal sentencing guidelines is both slippery and steep.

¹⁸⁸ 130 F. 3d at 621–626.

¹⁸⁹ *Id.* at 622; see also *Peterson*, 143 F. Supp. 2d at 589 (citing *Banks* for the requirement of a "finding of atypicality in the individual case in order for a sentencing court to depart from the Guidelines range.").

¹⁹⁰ *Banks*, 130 F. 3d at 626.

¹⁹¹ *Id.* at 625–26. (holding that, given the existence of § 3553(b), § 3553(a) only "provides directions to sentencing courts for assigning sentences *within* the Guidelines' range.")

¹⁹² This is not the only similarity to the pre-*Booker* world. For example, in *Anderson*, 82 F.3d at 436, the D.C. Circuit relied on § 3553(b) to reject a downward departure because of the findings in the Sentencing Commission's 1995 report. The court noted, again in language that resembles troubling post-*Booker* views, "Acceptance of appellants' argument would logically allow every sentencing district judge to select his or her personal crack-cocaine ratio, at any level between 100:1 (by denying departure) and 1:1. It is hard to imagine a more flagrant violation of the Guidelines' purpose to avoid 'unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.'" *Id.*, at 440 (citations omitted); but see *Id.*, at 445 (Wald, J., dissenting).

¹⁹³ 440 F. 3d 625, 625–39 (4th Cir. 2006).

¹⁹⁴ *Id.* at 634 (emphasis in original).

C. IS *BOOKER* A MUDDLE?

The sad, but perhaps not unexpected,¹⁹⁵ reality is that *Booker* on crack may be a bit of a muddle—at least for now. The interplay between congressional mandatory minimum statutes, Commission action and research, and § 3553(a) is likely to continue to produce a murky body of case law.

There are serious concerns about district judges, despite congressional mandatory minimum sentences, importing their own philosophies on crack versus powder sentencing that reflect substantially different views of the seriousness of the crime, and establish different sentencing benchmarks that arguably produce unwarranted disparity. However, there are also serious concerns about judges—trial or appellate—whose fealty to the guidelines seems to have survived the fires of *Blakely* and *Booker* unscathed.

Judicial flouting of congressional will is unacceptable. Judicial flouting of the United States Constitution—as interpreted by the Supreme Court in *Booker*—is unacceptable. Concerns over these two strands intertwine in the Gordian Knot of crack/powder sentencing.

III. WHO WILL BE SENTENCING'S ALEXANDER THE GREAT?

Alexander the Great undid the Gordian Knot by slicing it in two.¹⁹⁶ Who will wield the sword that cuts the Gordian Knot of post-*Booker* crack sentencing? Both the Supreme Court and Congress—like Alexander—have a sword that can split this knot.¹⁹⁷ Neither body has been anxious to volunteer, but one of them must act to resolve the tension and provide guidance to the lower courts.

Despite the spate of constitutional sentencing decisions emanating from the Supreme Court over the past several years, the Court has taken

¹⁹⁵ *Booker*, 543 U.S. at 312 (Scalia, J., dissenting from the remedy) (“What I anticipate will happen is that ‘unreasonableness’ review will produce a discordant symphony of different standards, varying from court to court and judge to judge . . .”).

¹⁹⁶ Kording, *supra* note 12, at 1258.

¹⁹⁷ Arguably, the Commission could try again by promulgating a new set of guidelines, but given Congress’s 1995 rejection of new crack guidelines and its refusal to act on the Commission’s 1997 and 2002 advice, such an approach seems unlikely to succeed. Furthermore, as noted above, the Commission may be uncomfortable setting up a guidelines structure that is disconnected from the mandatory minimum penalties. Such an approach could also arguably run afoul of some of the § 3553(a) provisions. *But see* Jon M. Sands, Amy Baron-Evans & Anne Blanchard, *Letter from Federal Defenders to U.S. Sentencing Commission about Federal Sentencing since United States v. Booker*, 18 FED. SENT’G. REP. 106, 108 (2005) (recommending that “the Commission should amend the Guidelines, either by incorporating a 20:1 powder to crack ratio, or by stating that the guideline sentence for 5 or more but less than 50 grams of crack is five years, and that the guideline sentence for 50 grams or more is ten years. Neither is prohibited by statute.”).

great pains to stay out of the business of interpreting and refining specific federal sentencing guidelines.¹⁹⁸ Nevertheless, the Supreme Court might see the crack/powder issue as a good vehicle for establishing the constitutional limits of mandating reliance on the “effectively advisory” guidelines, and for explicating the permissible role of sentencing statutes like the Anti-Drug Abuse Act of 1986, all in the context of § 3553(a). Yet, the unusual way in which these sentencing planets align is part of the reason the crack/powder issue is so challenging. The Court might want to take a different type of sentencing case, one which might more easily lend itself to broad application. Furthermore, given the applicability and importance of the Anti-Drug Abuse Act of 1986 to this sentencing problem, a legislative resolution may be more consistent with institutional roles than a judicial decision in any event.

Unfortunately, Congress has been reluctant to reexamine federal cocaine sentencing policy. Of course, Congress *can* solve the problem of post-*Booker* crack/powder sentencing—just as it has had the power (but not the will) to address the Commission’s evidence of the unfairness of the 100-to-1 ratio for more than ten years. At bottom, this is Congress’s responsibility,¹⁹⁹ but will it respond? The likely ongoing spectacle of feuding post-*Booker* crack cases may spark congressional action. As one district court noted, “[p]erhaps now, prodded by judicial and other observations regarding the inequity of the current crack and powder-cocaine sentencing structure, Congress will again consider and (one hopes) address this important issue.”²⁰⁰

If Congress does act, it is difficult to predict what its approach will be. It would be best if Congress would examine the extant research and the views of the Sentencing Commission with an open mind, and squarely address the question. At a minimum, I hope that Congress focuses on the substantive policy question and does not get caught up in perceived power struggles with the judiciary. This has never been about judges seeking more institutional power at Congress’s expense. After *Booker*, judges were placed in a nearly intractable position. Trying to honor both congressional and constitutional commands in this arena is not easy.

Substantive congressional action could come as part of a wholesale rejection or modification of the *Booker* regime, or in a targeted action focused solely on crack and powder cocaine. Concerning crack and

¹⁹⁸ *Braxton v. United States*, 500 U.S. 344 (1991).

¹⁹⁹ Cf. Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 465 (2006) (“Ultimate authority and responsibility for federal sentencing rests with Congress.”).

²⁰⁰ *Doe*, 412 F. Supp. 2d at 98. See also King & Mauer, *supra* note 80, at 135 (“Congress should review the recommendations of the Sentencing Commission regarding the powder/crack cocaine sentencing disparity and reconsider proposals to amend the law.”).

powder specifically, Congress has many options. It can lower or raise the relevant punishments. It can maintain, modify or eliminate the differentiated mandatory sentences. "Most important," according to sentencing scholar Paul Hofer, "Congress should concern itself with disparity arising from its own actions before addressing any disparity arising from increased discretion accorded judges."²⁰¹

In order to address this issue responsibly, regardless of the substantive outcome, Congress needs to understand that it is no longer 1986.²⁰² Circumstances—and the crack market—are different now than they were 20 years ago when Congress created the 100-to-1 ratio.²⁰³ For example, social scientists report that there "is currently very little difference between the violence associated with crack and that associated with powder."²⁰⁴ Furthermore, the public opposition to the crack/powder disparity has endured.²⁰⁵

But, of course, crime policy is often politically driven. And everyone is knowledgeable, or thinks they are, about crime and what should be done about it. The legendary criminologist and legal scholar Norval Morris put it well when he observed more than thirty-five years ago:

On the matter of crime—everyone is an expert in this field. Everyone knows by searching his own prejudices what should be done about crime. And this simple certainty makes scholarship difficult. You're always talking to experts; whereas the longer you spend studying, as

²⁰¹ Hofer, *supra* note 199, at 466.

²⁰² Open Letter to Congress, *Time to Mend the 'Crack' in Justice*, (February 16, 2006), www.cjpf.org/sentencing/crack.openlettertoCongress_feb2006.doc ("We recognize that two decades ago, little was known about crack, other than vague perceptions that this new derivative form of cocaine was more dangerous than its original powder form, would significantly threaten public health, and greatly increase drug-related violence. Since that time, copious documentation and analysis by the U.S. Sentencing Commission have revealed that many assertions were not supported by sound data and, in retrospect, were exaggerated or simply incorrect.").

²⁰³ Blumstein, *supra* note 54 at 87.

²⁰⁴ *Id.* at 91.

²⁰⁵ See, e.g., Letter from Justice Roundtable to Dr. Santiago Canton, Executive Secretary, Inter-American Commission on Human Rights (Dec. 20, 2005), available at www.drugpolicy.org/docUploads/LetterSantiagoCanton122005.pdf ("The most flagrant example of the discriminatory impact of mandatory minimum sentences is the distinction between crack and powder cocaine."); James E. Felman, *Testimony of James E. Felman, Esq., Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Judiciary Committee of the United States House of Representatives* 13 (June 13, 2006), available at <http://judiciary.house.gov/media/pdfs/felman061306.pdf> ("The 100:1 ratio for crack and powder is wrong."). Even if one was to equalize the punishment between crack and powder cocaine, the question of how to do so remains. Mr. Felman, a former Chairman of the United States Sentencing Commission's Practitioners' Advisory Group, believes that the "ratio should be changed without raising the penalties for powder because drug penalties are more than severe enough as they are." *Id.*

distinct from prejudicing, in this field, the less you feel competent about—their expertise remains firm, yours declines sharply.²⁰⁶

But there might be another way. Irrespective of its ultimate policy choice, Congress is in a position to live up to its highest ideals by facilitating a national conversation about what we as a society want from our punishment system.²⁰⁷ How can we best achieve those goals in the context of sentences for crack and powder cocaine offenses? If it approaches this task with both modesty and courage,²⁰⁸ Congress can educate the public and choose to work with rather than against the judicial²⁰⁹ and executive branches in a joint effort for the common good.

Congress can and should pick up the mantle of Alexander the Great and slice the Gordian Knot of post-*Booker* crack sentencing. May it swing the sword wisely.

²⁰⁶ Norval Morris, *The Businessman's Guide to Crime Control*, 37 SELECTED PAPERS OF THE GRADUATE SCHOOL OF BUSINESS 1, 3 (1972) (reprinting February 2, 1971 speech).

²⁰⁷ Cf. Carissa Byrne Hessick, *Prioritizing Policy Before Practice After Booker*, 18 FED. SENT'G. REP. 167, 167 (2006) (recommending that Congress and the Commission “should lead a public discussion to reevaluate the wisdom of the policy judgment embodied in the Federal Sentencing Guidelines.”).

²⁰⁸ Cf. *Sentencing and Data: The Not-So-Odd Couple*, 16 FED. SENT'G. REP. 1, 3–4 (2003). As I have written previously, “[t]he set of human interactions that culminate in the imposition of a criminal sentence are terribly complex. There is much that we do not know and will not know any time soon. . . . We must acknowledge the boundaries of our knowledge . . . in an effort to . . . prompt us to periodically re-examine the decisions we make. An awareness that our decisions are based on far less than perfect information should be humbling. A healthy dose of humility may keep us from getting perilously set in our ways.” Steven L. Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16 FED. SENT. REP. 1, 3–4 (2003).

²⁰⁹ See, e.g., Cassell, *supra* note 80 at 69 (“While making substantive recommendations about federal sentencing policy is not generally the purview of the Judicial Conference, the Criminal Law Committee is willing to consider and evaluate the Commission’s recommendations about reducing the disparity for crack and powder penalties.”).