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THE AMERICAN INQUISITION: SENTENCING AFTER  
THE FEDERAL GUIDELINES

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I.	A LONG TIME AGO . . .	1
II.	SENTENCING WARS	5
	A. The Guidelines Menace	7
	B. Attack of the Prosecutors	14
	C. Revenge of the DOJ	19
	D. A New Hope	21
	E. The Executive Strikes Back	27
	F. Return of the Juries	31
III.	THE SAGA CONTINUES	35
IV.	THE GUIDELINES' LEGACY: SENTENCING BY INQUISITION	41
	A. The High Price of Trials	42
	B. Rewards for "Cooperating-Witness" Testimony	51
	C. Inquisitorial Fact-Finding	56
	1. The Presentence Investigation and Report	60
	2. The Guidelines Calculation	67
	3. The Recommended Sentence	71
V.	RESTORING ADVERSARIAL SENTENCING	75

I. A LONG TIME AGO . . .

In August 1841, an officer led a "ragged and wretched looking man" into Boston's Police Court.<sup>1</sup> The man was charged with the crime of being a common drunkard, and a sentence to the House of Correction awaited him. The sot's appearance moved a bootmaker who chanced to be in court to converse with him.<sup>2</sup> Concluding that "he was not yet past all hope of reformation, although his appearance and his looks precluded a belief in the minds of others that he would ever become a *man* again," the bootmaker paid the

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\* Professor, University of Miami School of Law. Thanks to the participants in the University of Minnesota Law School faculty workshop of February 8, 2008, for their helpful feedback on an early draft of this Article. I am indebted also to Kathleen M. Williams and Scott A. Srebnick for insights into federal sentencing that they shared, which improved this project. Thanks to Lea Valdivia, Pedro P. Echarte III, and Samuel Randall for their exemplary research assistance and helpful comments on earlier drafts.

1. JOHN AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS, FOR THE LAST TEN YEARS, IN AID OF THE UNFORTUNATE 4 (Boston, Wright & Hasty 1852).

2. *Id.* at 4–5, 7.

drunkard's bail.<sup>3</sup> His success in reforming the drunkard led John Augustus to spend many years bailing criminals in whom he saw potential for reform and convincing judges to spare them incarceration, which would invariably end with a "return to their former mode of life."<sup>4</sup> The defendants' cases would "stand continued from term to term, and if at the expiration of a certain period, a good report was given of their behavior during the time they had been on probation, their sentences were very light."<sup>5</sup> His work garnered such notoriety that it led to the institution in one jurisdiction after another of public probation officers.<sup>6</sup>

The modern United States probation officer has far more in common with the petty officers who obstructed Mr. Augustus in his work than with the "father of probation" himself. Mr. Augustus saw himself as affording contrite defendants compassion and an opportunity for redemption. He believed that such people should not be punished both because it cost the Commonwealth money and because it would do no good: "The object of the law is to reform criminals, and to prevent crime and not to punish maliciously, or from a spirit of revenge."<sup>7</sup> That view has not prevailed, and today's federal probation officers see themselves primarily as law-enforcement agents rather than agents of mercy.

The transformation of the federal probation officer's role is owed to the Sentencing Reform Act of 1984<sup>8</sup> and the Federal Sentencing Guidelines it created. The Guidelines' extremely harsh sentences, the constraints they imposed on federal district court judges, and the power they conferred on prosecutors have been perennially controversial.<sup>9</sup> As a result, most scholars and jurists view the

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3. *Id.* at 5.

4. *Id.* at 5, 22–23.

5. *Id.* at 33.

6. This development was initially opposed, as Mr. Augustus notes, by a committee of the Massachusetts legislature, which concluded that "[t]he whole subject is one which . . . falls properly within the province of private charity." *Id.* at 32. Massachusetts became the first state in the Union to statutorily provide for probation in 1878. See ARTHUR W. CAMPBELL, LAW OF SENTENCING § 1:2, at 8 (2d ed. 1991).

7. AUGUSTUS, *supra* note 1, at 23; see *id.* at 100–01 (discussing the expense of incarcerating drunkards).

8. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

9. See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 130–42 (1998) (criticizing prosecutors' unchecked discretion under the Guidelines); see also *United States v. Flores*, 336 F.3d 760, 765–66 (8th Cir. 2003) (Bright, J., concurring); *United States v. Green*, 346 F. Supp. 2d 259 *passim* (D. Mass. 2004) (ascribing problems with Guidelines sentencing to the Department of Justice's efforts to monopolize power over sentences), *vacated in part*, *United States v. Yeje-Cabrera*, 430 F.3d 1 (1st Cir. 2005), and *vacated*, *United States v. Pacheco*, 434 F.3d 106 (1st Cir. 2006); Guido Calabresi, Address, *The Current, Subtle—and Not So Subtle—Rejection of an Independent Judiciary*, 4 U. PA. J. CONST. L. 637, 639 (2002)

Supreme Court's sentencing decisions of the past decade as the judiciary's reaction to a concentration of sentencing power in the Executive Branch.<sup>10</sup> Observing that the Guidelines "provided prosecutors with indecent power relative to both defendants and judges,"<sup>11</sup> Professor Kate Stith, for example, described the subsequent case law "as an institutional response by the Supreme Court . . . to several developments that threatened the integrity of federal criminal sentencing and, indeed, of the whole federal criminal justice system."<sup>12</sup> The inquisitorial processes the Guidelines introduced—especially assigning the United States Probation Office to investigate defendants and to argue for particular sentencing outcomes—have received comparatively scant attention.<sup>13</sup> Despite a dramatic and contentious series of high-court decisions, the Guidelines' inquisitorial regime has managed to persist essentially unchanged to this day, exerting a deeply pernicious effect on the federal criminal justice system. The Justices have fought over whether federal sentences will be determined through inquisitorial processes managed by bureaucrats or through adversarial litigation controlled by the parties.

Three features of the Guidelines regime function by design to ensure that sentences are determined inquisitorially, while prosecutors, defense lawyers, and judges are relegated to limited roles. First, the Guidelines exert tremendous pressure on defendants to forego trial by prescribing significantly harsher sentences for defendants who put the government to its burden.<sup>14</sup> Second, the Guidelines contain only one reliable means of mitigating the harsh sentences defendants typically face—denouncing other individuals.<sup>15</sup> Third, the Guidelines task probation officers to investigate crimes and defendants, to determine the presumptively correct facts of each case, to argue their interpretations of

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(arguing that the Guidelines transferred sentencing discretion from independent judges to prosecutors who "are subject to political pressures").

10. See, e.g., Frank O. Bowman, III, Essay, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 219 (2004) (noting that the Supreme Court's decision in *Blakely* was at least in part the result of the Court's concern regarding the Guidelines' removal of sentencing authority from the hands of the judiciary).

11. Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1425 (2008).

12. *Id.* at 1426.

13. For example, Professor Stith has noted that the Guidelines introduced inquisitorial elements, including "enlisting [probation officers]—beholden neither to the prosecutor nor to the defendant—to assist the judge in ferreting out 'the facts' of the case." *Id.* at 1437; see also STITH & CABRANES, *supra* note 9, at 85–91 (discussing probation officers' role after the SRA).

14. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a)–(b) (2009).

15. See *id.* § 5K1.1 (allowing courts to depart from the Guidelines when the defendant has provided "substantial assistance in the investigation or prosecution of another person who has committed an offense").

Guidelines provisions and case law, and to recommend a particular sentence in each case.<sup>16</sup> These three features of the Guidelines are intended to discourage adversarial challenges to government allegations for the sake of having an orderly and efficient criminal justice system.

For present purposes, an adversarial system is one in which the parties—the sovereign and the defendants—raise issues and make arguments in support of their factual and legal contentions before a passive judge or jury.<sup>17</sup> An inquisitorial system is one in which government officials actively investigate factual and legal issues and resolve them.<sup>18</sup> Thus, present-day federal sentencing is inquisitorial not only because most cases are resolved through plea bargaining, as Judge Gerard Lynch notably contended.<sup>19</sup> Even if plea bargaining is in some sense inherently inquisitorial, plea bargaining in a system that threatens very stiff penalties for anyone not waiving his right to trial is inquisitorial in a much more fundamental way.<sup>20</sup> In other words, the Guidelines reflect a calculated and deliberate inquisitorial agenda because they (1) cast demand for trial as a reprehensible act meriting senselessly harsh punishment, (2) reward incrimination of oneself and others through substantial reductions in punishment, and (3) charge a government bureaucrat with determining both the facts and the applicable punishment to prevent the parties from bargaining around the

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16. *See id.* § 6A1.1(a) (requiring that probation officers conduct a presentence investigation).

17. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 n.23 (1982) (defining an adversarial system as one in which “the parties control the pace and shape of the litigation”); *see also* United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (“The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.”).

18. *See* Resnik, *supra* note 17, at 380 n.24 (defining an inquisitorial system as one in which “state agents control the litigation”); *see also* Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1018–19 (1974) (“For inquisitorial systems, the dominant mode is state control of the case, usually through the judiciary, rather than party control.”).

19. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120–21 (1998).

20. The pre-Guidelines system gave prosecutors as well as defendants much more leverage in bargaining over dispositions than either has now and it was therefore adversarial in that even bargaining was driven by partisan incentives. Pre-Guidelines prosecutors would compromise cases for a host of reasons (e.g., reallocating resources to other cases, recognizing weaknesses in their case, appreciating a defendant’s sympathetic situation). The Guidelines are meant to prevent that by interposing probation officers who police the facts determining punishment and coldly pronounce a formulaic sentence in every case. Bargaining is still possible but it is much more difficult and uncertain because the probation officer is a free agent who can upset the parties’ agreement and expectation. *See infra* note 335.

severe one-size-fits-all penalties.

Part II of this Article briefly reviews the interbranch and intracourt skirmishes over sentencing power beginning with the promulgation of the Guidelines. Part III describes how the Guidelines fundamentally and unconstitutionally transformed federal sentencing into an inquisition. Part IV details how the Guidelines' strong pressure to admit all of the government's allegations—by pleading guilty, confessing, and incriminating others—unconstitutionally discourages trials and denies due process. Part IV also discusses how the probation officer's presentence investigation report and participation in the sentencing process is incompatible with the adversarial system and violates the Confrontation Clause as well as due process. The Article concludes in Part V that, whatever the costs in terms of uniform sentences and efficient processes, sentencing must be reformed by eliminating the large penalty the Guidelines inflict for going to trial and discarding the presentence investigation as the vestige of a rehabilitative regime that no longer exists.

## II. SENTENCING WARS

In 1980, Justice Thurgood Marshall wrote: “Some legal systems have been premised on the obligation of an accused to answer all questions put to him. In other societies law-abiding behavior is encouraged by penalizing citizens who fail to spy on their neighbors and report infractions. Our country, thankfully, has never chosen that path.”<sup>21</sup>

At the time, the federal criminal justice system, espousing the ideals exemplified by John Augustus, posited that judges should tailor a sentence to each individual defendant's prospects for rehabilitation.<sup>22</sup> As a result, federal district judges enjoyed virtually complete discretion to impose any sentence permitted by statute for a crime.<sup>23</sup> The Supreme Court generally viewed this as a salutary and progressive evolution in the law: “The belief no longer prevails that every offense in a like legal category calls for an identical

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21. *Roberts v. United States*, 445 U.S. 552, 571 (1980) (Marshall, J., dissenting).

22. *See, e.g., United States v. Grayson*, 438 U.S. 41, 51 (1977) (“Impressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may better respond to rehabilitative efforts . . . —are, for better or worse, central factors to be appraised under our theory of ‘individualized’ sentencing.” (quoting *United States v. Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974)).

23. *See* 18 U.S.C. § 3577 (1982) (repealed 1987, reenacted 1988, current version at 18 U.S.C. § 3661 (2006)); *United States v. Tucker*, 404 U.S. 443, 446 (1972) (stating that a trial judge “has wide discretion in determining what sentence to impose” and can “conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come”).

punishment without regard to the past life and habits of a particular offender.”<sup>24</sup> Additionally, the ultimate punishment might be mitigated by the United States Parole Commission, which could decide when an inmate was ready to reintegrate into society.<sup>25</sup>

Any given two individuals committing the same crime could receive significantly different sentences under that system. Guidelines proponents contended that the resulting “disparities,” as well as the indeterminate nature of criminal sentences, were fundamentally unfair and clamored for a reversion to a system of like punishments for like crimes.<sup>26</sup> This agitation led Congress to create the United States Sentencing Commission in 1984 and to task it with drafting the Federal Sentencing Guidelines.<sup>27</sup>

With the enactment of the Guidelines in 1987, the federal government abandoned nearly all pretense that sentences were intended to rehabilitate offenders.<sup>28</sup> Courts were statutorily

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24. *Williams v. New York*, 337 U.S. 241, 247 (1949).

25. *United States v. Booker*, 543 U.S. 220, 301 (2005) (Stevens, J., dissenting in part) (“Prior to the Guidelines regime, the Parole Commission was designed to reduce sentencing disparities and to provide a check for defendants who had received excessive sentences.”).

26. For an extensive treatment of the intellectual and political currents—including frustration with both a rehabilitative theory of punishment and with a perception of excessive judicial discretion—that converged in the 1970s and early 1980s to inspire federal sentencing reform, see STITH & CABRANES, *supra* note 9, at 29–48. See also Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28, 28 (1999) (“In seeking ‘greater fairness,’ Congress, acting in bipartisan fashion, intended to respond to complaints of unreasonable disparity in sentencing—that is, complaints that differences among sentences reflected not simply different offense conduct or different offender history, but the fact that different judges imposed the sentences.”); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295–96 (1993) (“Evidence that similar offenders convicted of similar offenses received, at times, grossly dissimilar criminal punishment struck a critical nerve among key legislators. . . . Quite frankly, all other considerations were secondary.”).

27. See S. REP. NO. 98-225, at 38–39, 52, 56 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3221–22, 3235, 3239 (stating that the purpose of the SRA was to achieve “fairness and certainty” and to eliminate “unwarranted sentencing disparity”).

28. Rehabilitation continued to be listed among the goals of sentencing, but it was (and is) widely understood that the new system would be predominantly retributive. See 18 U.S.C. § 3553(a)(2)(A)–(D) (2006) (listing the purposes of federal sentencing); see also *United States v. Wise*, 976 F.2d 393, 399 (8th Cir. 1992) (“Indeed, the Sentencing Reform Act places rehabilitation of the defendant as the last of four goals to be accomplished through a sentence, the first three of which are punishment, deterrence, and incapacitation.”). Congress in fact specified that “imprisonment is not an appropriate means of promoting correction and rehabilitation.” 18 U.S.C. § 3582(a) (2006). The circuits have split over whether this provision prevents judges from imposing a longer prison term for rehabilitative ends or applies only when a judge must choose between a probationary sentence and an incarcerative one. See *In re Sealed Case*, 573 F.3d 844, 848–49 (D.C. Cir. 2009).

directed to consider various factors at sentencing, including the history and characteristics of the defendant, the need to promote respect for the law, the need for specific and general deterrence, and the need to provide the defendant medical care, vocational training, or “other correctional treatment.”<sup>29</sup> But courts had to impose a sentence within the Guidelines range established by the Sentencing Commission.<sup>30</sup> Not only were those ranges computed without taking into account a defendant’s individual characteristics, but they were also harsh and rigid. Manifestly, the underlying purpose of federal Guidelines sentencing could be only to punish rather than to rehabilitate offenders.<sup>31</sup>

Anyone carrying out John Augustus’s work would obviously be superfluous to such a system. Accordingly, the SRA eliminated release on parole for nearly all federal offenders and provided for the dissolution of the Parole Commission.<sup>32</sup> Rather than eliminating probation officers, however, the SRA transformed them from “a prisoner’s friend, . . . a Christian advocate [who] shall represent the side of mercy in opposition to strict, untempered legality”<sup>33</sup> into the federal courts’ own inquisitor. The crux of their new *raison d’être* was to officiously investigate and tabulate each defendant’s transgressions so that he could more efficiently be made to pay for them.<sup>34</sup>

#### A. *The Guidelines Menace*

The superficially appealing but fundamentally misguided belief at the core of the Guidelines is that sentences should not vary with the personalities—judges, prosecutors, defense attorneys, and defendants—involved in a given case. Rather, similar offenses perpetrated by similar offenders should be punished similarly, if not identically. The Sentencing Commission understood that its mission was to “enhance the ability of the criminal justice system to combat crime” through the creation of a system of honest, uniform, and proportional sentences.<sup>35</sup> Honesty meant eliminating parole and curtailing credit for good behavior.<sup>36</sup> Uniformity meant specifying the same punishment for like crimes committed by like

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29. 18 U.S.C. § 3553(a)(1)–(2) (2006).

30. *Id.* § 3553(b).

31. *See* STITH & CABRANES, *supra* note 9, at 34–35 (discussing the retributive rationale that contributed to the 1970s movement for sentencing reform).

32. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235, 98 Stat. 1837, 2031–32 (codified as amended in scattered sections of 18 and 28 U.S.C.).

33. AUGUSTUS, *supra* note 1, at 61.

34. STITH & CABRANES, *supra* note 9, at 85–91.

35. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2009); *see also* 28 U.S.C. § 991(b)(1)(B) (2006).

36. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2009).

defendants.<sup>37</sup> Proportionality meant punishing more serious crimes more severely.<sup>38</sup>

While neither honesty nor proportionality was very controversial, “uniformity” proved a complex and elusive goal.<sup>39</sup> No player in the criminal justice system has ever been interested in achieving uniformity. Just as defendants and defense attorneys want to make any and all possible arguments for mitigating punishment, individual prosecutors value the flexibility of being able to resolve cases through negotiated pleas.<sup>40</sup> The Department of Justice, despite its rhetoric extolling uniformity, has an institutional interest in trading lenient sentences for favorable testimony, rapid disposition of minor cases, or other cooperation from defendants.<sup>41</sup> It benefits from monopolizing the power to offer substantially reduced sentences to induce defendants to admit all of the prosecution’s accusations, plead guilty, and cooperate against others. The Sentencing Commission abets DOJ’s dissimulation by essentially disregarding sentencing disparity attributable to substantial-assistance downward departures but seeking to eliminate disparity caused by departures sought by the defense.<sup>42</sup>

To achieve uniformity, the Sentencing Commission decided that punishments needed to be based on “the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted.”<sup>43</sup> Otherwise, the parties could negotiate disparate sentences through charge bargaining. Sentencing on the basis of “real conduct” rather than charged conduct necessitated developing detailed categories of crimes along with both general and specific “enhancements” to account for the various ways in which a given offense might be committed.<sup>44</sup> “A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away

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37. *See id.*

38. *See id.*

39. *See* STITH & CABRANES, *supra* note 9, at 112–16.

40. *See* John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentencing Bargains*, 36 HOFSTRA L. REV. 639, 647–49 (2008) (stating that individual federal prosecutors seek to reach sentencing bargains with defendants in defiance of DOJ’s official policy forbidding such agreements).

41. *See* Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374, 1408 (2008) (discussing how in districts with pressing loads of immigration cases, “the ostensible allegiance to national uniformity soon gave way to ‘fast-track’ programs that offered deep discounts to defendants willing to enter quick guilty pleas”).

42. *See, e.g.*, STITH & CABRANES, *supra* note 9, at 114 (noting that, in a study of disparity under the Guidelines, the Commission did not count substantial-assistance downward departures as contributing to disparity).

43. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2009).

44. For a detailed explanation of how the Guidelines achieve this, see STITH & CABRANES, *supra* note 9, at 66–77.



damaging property during his escape.”<sup>45</sup> Regardless of the elements constituting the actual charge against the defendant, the Guidelines specified that the sentence should be based on all “relevant conduct” in order to minimize the parties’ bargaining ability.<sup>46</sup> As a result, even sentences following a trial would be based on facts found by a judge—“regardless of the jury’s actual, or assumed, beliefs about” what the defendant did.<sup>47</sup> Not surprisingly, defining the Guidelines’ central concept of “relevant conduct”—let alone ascertaining what it might comprise in any given case without relying on the parties to provide the facts—would prove extraordinarily vexing.<sup>48</sup>

The Sentencing Commission faced having to categorize the numerous and often overlapping statutory offenses and having to specify subcategories capturing the particular acts entailed in the commission of each crime. The result was a matrix that assigned a “base offense level” from one to forty-three to each crime and placed each defendant in one of six criminal-history categories depending on the extent of his record.<sup>49</sup> The offense level would be adjusted depending on the particulars of the offense and on whether the defendant pled guilty or exercised his right to trial. The Commission set the offense levels by analyzing sentences from thousands of cases as well as other data, which it dubbed an “empirical approach.”<sup>50</sup> The Commission acknowledged that it departed from the empirical data to further certain policies, such as that reflected in recently increased penalties for drug crimes.<sup>51</sup> In addition, the Commission had to abide by express congressional directives requiring “substantial penalties for certain recidivists, violent felons, and drug offenders.”<sup>52</sup> The intersection within the matrix of the defendant’s criminal-history category with his total offense level corresponded to a narrow range of months in prison

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45. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2009).

46. *See id.* § 1B1.3 (purporting to define “relevant conduct”); *see also id.* § 6B1.2 (encouraging courts to reject plea agreements that alter the Guidelines sentence); *id.* § 6B1.4 (encouraging courts to verify parties’ factual stipulations).

47. *See Edwards v. United States*, 523 U.S. 511, 512–14 (1998) (unanimously holding that a judge could predicate a sentence for a defendant convicted of conspiring to traffic cocaine on a finding that the defendant conspired to traffic crack as long as the sentence did not exceed the statutory maximum for a cocaine-only conspiracy).

48. *See STITH & CABRANES*, *supra* note 9, at 96–97.

49. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2009).

50. *See id.* ch. 1, pt. A, introductory cmt.; *see also* William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 184 (1988).

51. *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007); *see also* Wilkins, *supra* note 50, at 184.

52. Wilkins, *supra* note 50, at 184.

that bracketed the judge's sentencing authority.<sup>53</sup> Departures would be permitted only when the judge found "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission" or when the government requested a reduction for a cooperator who "substantially assisted" prosecutors.<sup>54</sup> Defense-requested downward departures were intended to be extraordinary and would prove rare.<sup>55</sup> As a result, judges, commentators, and the Sentencing Commission itself viewed the Guidelines as transferring the power to determine the sentence in each case from the judge to the prosecutor.<sup>56</sup>

The more difficult—and in reality, insuperable—obstacle to implementing a "real conduct" system lay not in categorizing crimes but in ascertaining the real conduct for each case. Determining the facts for sentencing through an adversarial process would in effect require trying not only every defendant who pled not guilty but also every defendant who admitted the crime but disputed the prosecutor's account of how it was committed. Also, an adversarial process would compromise uniformity both because defendants are constitutionally privileged to adduce no information<sup>57</sup> and because the parties could plea bargain.<sup>58</sup> Perceiving these inefficiencies as symptoms of an "administrative" problem rather than aspects of an ingenious edifice of obstacles to government overreaching, the original Sentencing Commission created a sentencing procedure utterly alien to the common-law legacy presupposed and protected

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53. See 18 U.S.C. § 3553(a)(4), (b)(1)–(2) (2006) (stating that courts "shall impose a sentence of the kind, and within the range" set by the Guidelines); *Mistretta v. United States*, 488 U.S. 361, 367 (1989) (explaining that Congress expressly opted to create a "mandatory-guideline system" rather than one that was "only advisory").

54. 18 U.S.C. § 3553(b)(1), (e).

55. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2009); *Koon v. United States*, 518 U.S. 81, 96 (1996) ("The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'"); *United States v. Roberts*, 726 F. Supp. 1359, 1365 & n.39 (D.D.C. 1989), *rev'd on other grounds sub nom. United States v. Mills*, 925 F.2d 455 (D.C. Cir. 1991); see also STITH & CABRANES, *supra* note 9, at 99–100.

56. See *Roberts*, 726 F. Supp. at 1363–68 ("[T]he de facto transfer of much of the responsibility for sentencing from impartial judges to prosecutors has had the effect of disturbing the due process balance essential to the fairness of criminal litigation."); STITH & CABRANES, *supra* note 9, at 1 ("[T]he new regime sought to strip [judges] of authority to determine the purposes of criminal sentencing, the factors relevant to sentencing, and the proper type and range of punishment in most cases."); see also U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2009) ("The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment.")

57. See U.S. CONST. amend. V.

58. See Stith, *supra* note 11, at 1424–25.

by the Constitution.

For decades before the SRA, probation officers had been writing presentence investigation reports to determine each defendant's rehabilitation prospects.<sup>59</sup> The Probation Act of 1925<sup>60</sup> introduced John Augustus's vision of probation into the federal system.<sup>61</sup> It authorized district judges to suspend even a mandatory minimum sentence indefinitely and substitute a period of probation whenever the court determined "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby."<sup>62</sup> The Probation Act empowered judges to appoint probation officers to serve, as Mr. Augustus had, without compensation unless the judge determined a salaried position was necessary.<sup>63</sup> Each probation officer was authorized, presumably to assist the court in determining whether a given defendant was worthy of probation, to report on "any case referred to him for investigation by the court."<sup>64</sup> The initial presentence investigation report, therefore, was akin to Mr. Augustus's careful selection of those whom he bailed.<sup>65</sup> A

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59. As Chief Justice Burger explained it:

Indeterminate sentencing under the rehabilitation model presented sentencing judges with a serious practical problem: how rationally to make the required predictions so as to avoid capricious and arbitrary sentences, which the newly conferred and broad discretion placed within the realm of possibility. An obvious, although only partial, solution was to provide the judge with as much information as reasonably practical concerning the defendant's "character and propensities[,] . . . his present purposes and tendencies," and, indeed, "every aspect of [his] life." Thus, most jurisdictions provided trained probation officers to conduct presentence investigations of the defendant's life and, on that basis, prepare a presentence report for the sentencing judge.

United States v. Grayson, 438 U.S. 41, 48 (1978) (alteration in original) (citations omitted) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937), and *Williams v. New York*, 337 U.S. 241, 250 (1949)).

60. Probation Act of 1925, Ch. 521, 43 Stat. 1259.

61. Prior to that, federal courts informally "exercised a form of probation either by suspending sentence or by placing the defendants under State probation officers or volunteers." *United States v. Murray*, 275 U.S. 347, 354 (1928) (quoting H.R. REP. NO. 68-1377, at 1 (1925)). In 1916, the Supreme Court ruled that federal courts lacked the power to suspend permanently a mandatory minimum sentence established by Congress for a crime. *See Ex parte United States*, 242 U.S. 27, 41-42 (1916). The Court noted that Congress could subject such penalties, "by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to meet, by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment." *Id.* at 52. With the Probation Act of 1925, Congress accepted the Court's invitation.

62. Probation Act of 1925 § 1, 43 Stat. at 1259.

63. *Id.* § 3, 43 Stat. at 1260.

64. *Id.* § 4, 43 Stat. at 1260.

65. *See* AUGUSTUS, *supra* note 1, at 18 ("It should not be supposed that I assumed such obligations merely at the solicitation of the unfortunate, or without due investigation into the merits of their cases and a scrupulous

defendant could waive preparation of the report (with court approval) if he did not believe it would benefit him at sentencing.<sup>66</sup> This was consistent with probation officers' historical role as social workers, charged "to aid persons on probation and to bring about improvements in their conduct and condition,"<sup>67</sup> rather than law enforcement agents. The report helped effectuate a decidedly rehabilitative system of criminal justice.

The Sentencing Commission saw that these reports could be commandeered for ascertaining the facts of each case through an efficient, nonadversarial "judicial" investigation. Allowing defendants to waive preparation of the repurposed presentence investigation report would be self-defeating, as the Commission made clear in the Guidelines themselves: "A thorough presentence investigation ordinarily is essential in determining the facts relevant to sentencing."<sup>68</sup> Accordingly, the Guidelines system authorized dispensing with the report only when the judge certified that he had sufficient information to impose sentence.<sup>69</sup> In addition, the probation officer, typically not a lawyer, was to compute the Guidelines range that he "believe[d] to be applicable to the defendant's case"<sup>70</sup> and explain whether any departure was indicated—a task requiring interpretation of statutes and case law. Thus, the SRA perverted the probation officer's investigation and report, transforming it from an instrument of potential mercy to an instrument of inquisition and punishment.<sup>71</sup>

The presentence investigation report would continue to include an excruciatingly detailed investigation of the defendant's background—even though the Guidelines made it irrelevant.<sup>72</sup> In its

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examination into the history and character of each individual.").

66. See FED. R. CRIM. P. 32(c)(1) (1986).

67. Probation Act of 1925 § 4, 43 Stat. at 1261; see also *Williams v. New York*, 337 U.S. 241, 249 (1949) ("Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.").

68. U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 cmt. (2009), *invalidated* by *United States v. Detwiler*, 338 F. Supp. 2d 1166 (D. Or. 2004).

69. See FED. R. CRIM. P. 32(c)(1); U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (1987); see also 18 U.S.C. § 3552 (2006).

70. FED. R. CRIM. P. 32(c)(2)(B) (1987).

71. In 1986, the Supreme Court ruled 5–4 in *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986), that a minimum sentence could constitutionally be required if a judge found by a preponderance of the evidence that a weapon was used during the commission of any offense. The Court rejected in one terse paragraph the idea that imposing a mandatory minimum based on a fact not proven beyond a reasonable doubt to a jury violated the Sixth Amendment. *Id.* at 93. This case paved the way for the Guidelines to allow for sentencing enhancements to be imposed whenever the predicate fact was proven to the judge by a preponderance of the evidence.

72. See *United States v. Roberts*, 726 F. Supp. 1359, 1367 n.51 (D.D.C. 1989) ("[S]ubstantial portions of the Probation Department's presentence reports, which describe the defendant's background and history, have become largely obsolete. The principal utility of the reports that remains is that they

pursuit of uniformity, the Sentencing Commission took nearly every conceivable mitigating factor off the table; the defendant's age, education, job skills, mental health, physical health, history of addiction, employment record, family ties, community ties, socioeconomic status, military service, charitable or civic works, and disadvantaged upbringing were all deemed "not ordinarily relevant" to sentencing.<sup>73</sup> None of these considerations could serve as a basis for a sentence below the Guidelines range except in a truly extraordinary case.<sup>74</sup> Having probation officers continue to gather and report this data, however, gave the new presentence investigation a business-as-usual patina of legality, enabling it to more easily survive constitutional challenge.

Stephen Breyer, an original member of the Sentencing Commission while a judge on the First Circuit and one of the Guidelines' principal architects,<sup>75</sup> defended eliminating consideration at sentencing of defendants' backgrounds and utilizing probation officers to ascertain the facts. In an overweening article published shortly after the Guidelines were promulgated, Justice Breyer argued that weighing a defendant's particular circumstances would foster intolerable uncertainty and defeat uniformity.<sup>76</sup> He defended the Guidelines' reliance on inquisitorial fact-finding on the grounds that adversarial fact-finding would have been too inefficient: "[T]he requirement of full blown trial-type post-trial procedures, which include jury determinations of fact, would threaten the manageability that the procedures of the criminal justice system were designed to safeguard."<sup>77</sup> This fundamental misconception of the criminal justice system—which views the Constitution as guaranteeing not fairness but "manageability"—pervades the Guidelines and Justice Breyer's opinions as well. The former administrative-law professor's judicial service has not altered his view that "the criminal justice system is an administrative system and, accordingly, must be administratively

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provide the computation of the various points and levels that make up the sentence under the Guidelines."), *rev'd on other grounds sub nom.* United States v. Mills, 925 F.2d 455 (D.C. Cir. 1991).

73. See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H (2009) ("Specific Offender Characteristics").

74. See *Koon v. United States*, 518 U.S. 81, 94 (1996) ("[T]he act authorizes district courts to depart in cases that feature aggravating or mitigating circumstances of a kind or degree not adequately taken into consideration by the Commission.").

75. See STITH & CABRANES, *supra* note 9, at 58. Before being appointed to the federal bench, Breyer helped instigate the creation of the Guidelines as a member of the Senate Judiciary Committee staff. See *id.* at 49; see also Tony Mauro, *Breyer Consulted Ethics Expert over Sentencing Case Recusal*, LEGAL TIMES, Jan. 17, 2005, at 10.

76. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 19–20 (1988).

77. *Id.* at 11.

workable.”<sup>78</sup> He has proven a steadfast apologist for the Guidelines, adulating the orderly, bureaucratic system they erected for dictating sentences.<sup>79</sup>

*B. Attack of the Prosecutors*

Even before the Guidelines went into effect, the Department of Justice began its campaign to monopolize sentencing mitigation. In a regime of fixed, harsh sentences, exclusive executive control over mitigation greatly facilitates prosecutions. Defendants whose only hope for a less-than-Draconian sentence lies with the prosecutor can be made to plead guilty and to provide helpful information and testimony against others. To achieve that, DOJ has continually pressed to keep Guidelines sentences high and to prevent judges from departing downward without the prosecution’s acquiescence.<sup>80</sup> The Department has even managed to have sentencing reductions for guilty pleas partially depend on whether the prosecutor is satisfied that the defendant has confessed fully.

The Sentencing Commission provided the prerequisite condition for DOJ’s consolidation of power by imposing an unprecedentedly harsh schedule of punishments. Paul H. Robinson, an original member of the Sentencing Commission, dissented from the promulgation of the Guidelines in part because they were unjustifiably harsh.<sup>81</sup> Robinson contended that, rather than following Congress’s directive to take a fresh, empirical look at sentencing options, the Commission codified past sentencing averages without any claim that those averages were themselves rational or furthered Congress’s objectives.<sup>82</sup> Moreover, the averages used did not reflect probationary sentences and thus yielded much harsher punishment ranges without justification.<sup>83</sup> This may explain Professor Stith’s and Judge José A. Cabranes’s observation that, prior to the Guidelines, half of all federal sentences did not entail prison but during the 1990s only fifteen

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78. *Id.* at 13.

79. *See, e.g.*, *Rita v. United States*, 551 U.S. 338 *passim* (2007) (providing a gratuitous description of sentencing procedure by Justice Breyer); *Blakely v. Washington*, 542 U.S. 296, 330, 344–45 (2004) (Breyer, J., dissenting) (arguing that the Constitution should not be interpreted in a way that brings into doubt the Guidelines’ validity); Breyer, *supra* note 26, at 19–20; Breyer, *supra* note 26; *see also Blakely*, 542 U.S. at 312 (describing the mandatory Guidelines as “the regime [Justice Breyer] champions”); *id.* at 313 (“Justice Breyer may be convinced of the equity of the regime he favors, but his views are not the ones we are bound to uphold.”).

80. *See* Susan R. Klein & Sandra Guerra Thompson, *DOJ’s Attack on Federal Judicial “Leniency,” The Supreme Court’s Response, and the Future of Criminal Sentencing*, 44 TULSA L.J. 519, 519–20 (2009).

81. *See* Paul H. Robinson, “Dissenting View of Commissioner Paul H. Robinson,” 41 *Crim. L. Rep. (BLA)* 3174 (1987).

82. *See id.* at 3174–75.

83. *See id.* at 3175 & n.11.

percent did not.<sup>84</sup> Robinson predicted that the Guidelines would yield more irrationality than the indeterminate sentencing system they replaced.<sup>85</sup> To illustrate his point, Robinson catalogued many pairs of crimes of widely varying seriousness that were nonetheless punished equally.<sup>86</sup> He argued that the Guidelines the Commission produced were fundamentally flawed and should be scrapped.<sup>87</sup>

Around the time the Guidelines were being drafted, Congress began to enact mandatory minimum sentences for various crimes.<sup>88</sup> In 1986, Congress amended the SRA to permit judges to sentence below the statutory minimum for drug crimes only if the prosecution agreed that the defendant had cooperated with law enforcement. Without a motion from the prosecution, a judge would remain powerless to sentence below the minimum.<sup>89</sup> That same legislation included another provision desired by DOJ: a directive to the Sentencing Commission that the Guidelines reward cooperating with the government.<sup>90</sup> That directive would be fulfilled by section 5K1.1 of the Guidelines and amended Federal Rule of Criminal Procedure 35, which, respectively, allowed for cooperation reductions at or after sentencing with a government motion.<sup>91</sup>

Before the Guidelines, federal judges determined whether a cooperating witness's assistance to the United States demonstrated progress toward rehabilitation and thus merited a sentencing reduction.<sup>92</sup> Rule 35 then permitted a sentencing judge to revisit a sentence within 120 days after it had been imposed or affirmed on appeal, regardless of any government motion.<sup>93</sup> A defendant who cooperated could ask the court for consideration at or after sentencing even if the prosecutor objected. The Guidelines committed the decision to bestow cooperation credit entirely to the

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84. See STITH & CABRANES, *supra* note 9, at 5, 20.

85. See Robinson, *supra* note 81, at 3175 & n.11.

86. See *id.* at 3175–77 & nn.13–39.

87. See *id. passim*. Though not a voting member, ex officio Commissioner Ronald L. Gainer, a career DOJ staffer, noted that he too would have voted against the Guidelines promulgated. *Id.* at 3174 n.\*.

88. See STITH & CABRANES, *supra* note 9, at 43.

89. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1007, 100 Stat. 3207-7 (codified at 18 U.S.C. § 3553(e) (2006)) (“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.”).

90. *Id.* § 1008, 100 Stat. 3207-7–3207-8 (codified at 28 U.S.C. § 994(n) (2006)).

91. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009); FED. R. CRIM. P. 35(b)(1)–(2).

92. See, e.g., *Roberts v. United States*, 445 U.S. 552, 557 & n.4 (1980) (“The question for decision is simply whether petitioner’s failure to cooperate is relevant to the currently understood goals of sentencing.”).

93. See FED. R. CRIM. P. 35 (1985).

prosecution's unreviewable discretion.<sup>94</sup> Courts retained responsibility over the amount of a reduction but had no power to consider a cooperating witness's acts without a government motion.<sup>95</sup> A typical plea agreement provided that the government would file a substantial-assistance motion only if prosecutors deemed a cooperating witness's testimony satisfactory. Moreover, nothing that a defendant confessed pursuant to a cooperation agreement could be used to increase his sentence.<sup>96</sup> Needless to say, this potently pressured defendants to work with the government, compromising the courts' truth-seeking function and inviting corruption:

It is a reality that when the prosecution tells a cooperating witness he must "tell the truth" it is the same prosecution that determines what the "truth" is, regardless of the good faith of the prosecutor. This is obvious to the cooperating witness. Consequently, if the cooperating witness' testimony is not consistent with what the prosecution perceives the truth to be, there is no leniency. This does not appear to be conducive to encouraging untainted "truthful" testimony.<sup>97</sup>

Despite the serious threat that the government's exclusive control over substantial-assistance reductions poses to the integrity of trials, Justice Breyer considered this aspect of the SRA merely a "nonessential, peripheral feature[] of the Guidelines."<sup>98</sup>

The Guidelines also pressure defendants to confess by exposing a defendant who waives trial and pleads guilty to a much lower sentencing range. The Guidelines originally afforded a defendant

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94. See, e.g., *Wade v. United States*, 504 U.S. 181, 185 (1992) ("[In] § 5K1.1 the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted."); *United States v. Underwood*, 61 F.3d 306, 312 (5th Cir. 1995) (holding that a court cannot remedy prosecutors' refusal to move for a sentencing reduction even though the defendant pled guilty and cooperated and even if prosecutors misled the defendant); *United States v. Forney*, 9 F.3d 1492, 1499–1503 & nn.2, 4 (11th Cir. 1993); *United States v. Goroza*, 941 F.2d 905, 907–10 (9th Cir. 1991) ("The defendant's acquittal of perjury does not preclude the government from determining that [he] had not provided truthful information and thus had not substantially cooperated."); see also Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1711–12 (1992).

95. See, e.g., *Melendez v. United States*, 518 U.S. 120, 134 (1996) (Breyer, J., concurring in part and dissenting in part); *United States v. Ming He*, 94 F.3d 782, 788–89 (2d Cir. 1996); *United States v. White*, 71 F.3d 920, 923 (D.C. Cir. 1995); *Forney*, 9 F.3d at 1499; *United States v. Cueto*, 9 F.3d 1438, 1441–42 (9th Cir. 1993); *United States v. White*, 869 F.2d 822, 828–29 (5th Cir. 1989).

96. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.8(a) (2009).

97. *United States v. Fraguela*, No. CRIM.A. 96-0339, 1998 WL 560352, at \*1 (E.D. La. Aug. 27, 1998), *vacated on other grounds*, 1998 WL 910219 (E.D. La. Oct. 7, 1998).

98. Breyer, *supra* note 76, at 32.



who “clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction” a two-point reduction in his offense level.<sup>99</sup> They specifically provided that the reduction was not conditioned on a guilty plea, although the application notes strongly implied otherwise by suggesting that a defendant who did not confess to the underlying conduct should not receive the reduction:

Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).<sup>100</sup>

Although it detracts from uniformity, Justice Breyer rationalized the acceptance-of-responsibility reduction on the grounds that it “reflects actual past practice.”<sup>101</sup> He recognized that expressly allowing judges to trade a lower sentence for a guilty plea might be deemed punishment for exercising the right to trial.<sup>102</sup> Justice Breyer approved, however, of skirting the constitutional

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99. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1987). While the original Guidelines required a defendant to take “responsibility for the offense of conviction,” the following year they were amended to require acceptance of “responsibility for his criminal conduct.” U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1988). The circuits then split over whether conditioning the reduction on the defendant’s confessing uncharged conduct violated the Fifth Amendment. *See* *Ebbole v. United States*, 8 F.3d 530, 535–37 (7th Cir. 1993) (describing the circuit split); *United States v. Corbin*, 998 F.2d 1377, 1389–90 (7th Cir. 1993) (collecting cases). The Sentencing Commission resolved the split in 1992 by requiring that a defendant accept “responsibility for his offense” and providing an additional one-point reduction if the defendant “timely” confesses his crime and announces his intent to plead guilty, “thereby permitting the government to avoid preparing for trial.” U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a)–(b) & cmt. n.1(a) (1992) (“[A] defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction . . .”). A defendant who contradicts the government’s version of events may not only lose the acceptance-of-responsibility reduction, he may also find his sentence enhanced for obstructing justice. *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 & cmt. n.4(g)–(h) (2009) (stating that while a defendant who stands silent does not obstruct justice, one who provides “false” information to a law-enforcement agent or a probation officer does).

100. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.2 (1988).

101. Breyer, *supra* note 76, at 28.

102. *See id.* (“[T]o explicitly write a reduction into the Guidelines based on a guilty plea is to explicitly tell a defendant that a guilty plea means a lower sentence and that insistence upon a jury trial means a higher sentence.”); *see also* *United States v. Jones*, 997 F.2d 1475, 1480–81 (D.C. Cir. 1993) (en banc) (Mikva, J., dissenting) (collecting cases).

issue by phrasing the acceptance-of-responsibility provision vaguely in order to deliberately give the impression that it accorded with the Sixth Amendment. As he explained it, “In effect, the Guidelines leave the matter to the discretion of the trial court.”<sup>103</sup>

With time, the Guidelines came to condemn the exercise of the right to trial clearly and expressly. The pretenses that the acceptance-of-responsibility reduction was discretionary rather than essentially automatic and that it was meant to do anything but discourage trials and encourage confessions were abandoned. In 1990, the requirement of a guilty plea was made explicit in a note stating that the reduction “is not intended to apply to a defendant who puts the government to its burden of proof at trial.”<sup>104</sup> The following year, the guideline itself and its notes were rewritten, retaining the two-point reduction for each defendant who “clearly demonstrates acceptance of responsibility for his offense”<sup>105</sup> by not putting “the government to its burden of proof at trial”<sup>106</sup> or “falsely den[ying], or frivolously contest[ing]”<sup>107</sup> any conduct that the Guidelines deem relevant to sentencing. Additionally, it now offered defendants with a base offense level of at least sixteen a further one-point reduction for “timely” giving the government a complete confession and committing to plead guilty, “thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.”<sup>108</sup> In 2003, Congress passed legislation drafted by the Department of Justice that predicated the third point on the prosecutor being satisfied “that the defendant has

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103. Breyer, *supra* note 76, at 29 (“The Guidelines are vague regarding the precise meaning of ‘acceptance of responsibility.’”).

104. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.2 (1991). The revised comment read in its entirety:

This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

*Id.* (emphasis omitted); see also *Jones*, 997 F.2d at 1478 (collecting cases and noting, “The Guidelines explicitly tell judges that they normally should deny the two-point reduction to a defendant who does not plead guilty”).

105. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1992).

106. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt., n.2 (1991).

107. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt., n.1(a) (1992).

108. *Id.* § 3E1.1(b).

assisted authorities . . . by timely notifying authorities of his intention to enter a plea of guilty.”<sup>109</sup> The Guidelines made putting “the government to its burden” a vice rather than a right and presumed that defendants should “assist[] authorities”—notions at odds with the adversarial process.

C. *Revenge of the DOJ*

During the Guidelines’ early days, judges resisted having their discretion over sentencing supplanted with a bureaucratized regime. Most early constitutional challenges to the new Guidelines were warmly received by federal district court judges.<sup>110</sup> The Guidelines were deemed to violate the separation of powers because the Sentencing Commission had been located within the Judicial Branch<sup>111</sup> and because Congress had delegated a core legislative function to the Commission.<sup>112</sup> The Guidelines also were held to violate defendants’ due process rights by taking discretion away from the sentencing judge.<sup>113</sup> Courts upholding the Guidelines gave inconsistent rationales.

With the Guidelines invalidated in an increasing number of districts, the Supreme Court, heeding the less-than-subtle pleas from district court judges for final resolution of the issue,<sup>114</sup> granted a writ of certiorari in a Guidelines case even before the circuit court had entered its opinion.<sup>115</sup> Routing the detractors in the lower judicial ranks, eight of the Court’s nine members declared in

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109. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2003); *see also infra* Part II.E (discussing the Feeney Amendment).

110. *See* *United States v. Brown*, 690 F. Supp. 1423, 1426 (E.D. Pa. 1988) (noting that as of July 1988 there had been 194 constitutional Guidelines challenges, with 116 federal judges finding them unconstitutional and 78 denying the challenges).

111. *See, e.g., id.* at 1428–30; *United States v. Bogle*, 689 F. Supp. 1121, 1160–61 (S.D. Fla. 1988) (en banc) (“While a properly constituted agency may be delegated with [*sic*] such a task, the involvement of judges in this venture defines the constitutional infirmity.”); *United States v. Arnold*, 678 F. Supp. 1463, 1469 (S.D. Cal. 1988) (“The court agrees with the defendants and the Government that the [SRA] impermissibly designates the Commission as a part of the Judicial Branch.”).

112. *See, e.g., United States v. Brodie*, 686 F. Supp. 941, 945–47 (D.D.C. 1988); *United States v. Estrada*, 680 F. Supp. 1312, 1318–29 (D. Minn. 1988).

113. *See, e.g., United States v. Scott*, 688 F. Supp. 1483, 1494 (D.N.M. 1988); *United States v. Brittman*, 687 F. Supp. 1329, 1357 (E.D. Ark. 1988) (en banc); *United States v. Perez*, 685 F. Supp. 990, 1003 (W.D. Tex. 1988); *Brodie*, 686 F. Supp. at 952; *United States v. Martinez-Ortega*, 684 F. Supp. 634, 636 (D. Idaho 1988); *United States v. Ortega Lopez*, 684 F. Supp. 1506, 1512–13 (C.D. Cal. 1988) (en banc); *United States v. Bolding*, 683 F. Supp. 1003, 1005 (D. Md. 1988); *United States v. Elliott*, 684 F. Supp. 1535, 1541 (D. Colo. 1988).

114. *See, e.g., Brown*, 690 F. Supp. at 1426 (“Despite the diversity of rationale and result in the [Guidelines challenges], all courts agree that speedy appellate review will be a welcome development.”).

115. *See Mistretta v. United States*, 488 U.S. 361, 362 (1989).

*Mistretta v. United States* that the Guidelines and the Sentencing Commission were both constitutional.<sup>116</sup> Justice Blackmun's long majority opinion began by recounting the history of federal sentencing practice and noting that the Guidelines were borne from disillusionment with the rehabilitative theory of punishment that was the basis of indeterminate sentencing.<sup>117</sup> The Court rejected every major argument leveled against the Guidelines' constitutionality up to that point. Likening the Commission to other administrative bodies, the Court held that its creation was not an unconstitutional delegation of legislative power.<sup>118</sup> The Court also rejected various separation-of-powers arguments, holding that the Constitution did not bar locating the Commission within the Judicial Branch even though it made policy,<sup>119</sup> including federal judges as Commissioners despite the risk of an appearance of partisanship,<sup>120</sup> or granting the President authority to remove Commissioners for good cause.<sup>121</sup>

*Mistretta* was a devastating blow to those in the judiciary who believed the Guidelines gave too much power to prosecutors and too little to judges. Judge J. Lawrence Irving, a Reagan appointee to the Southern District of California, was the first to resign over the Guidelines.<sup>122</sup> "I've had a problem with mandatory sentencing in almost every case that's come before me,"<sup>123</sup> he told the *New York Times*. "I just can't, in good conscience, continue to do this."<sup>124</sup> Others would follow.<sup>125</sup> Over the next several years, judges

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116. *See id.* at 374–75.

117. *See id.* at 363 ("Both indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society."); *id.* at 366 ("The Report referred to the 'outmoded rehabilitation model' for federal criminal sentencing, and recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed." (quoting S. REP. No. 98-225, at 38 (1983))).

118. *See id.* at 374–75.

119. *See id.* at 393 ("We do not believe, however, that the significantly political nature of the Commission's work renders unconstitutional its placement within the Judicial Branch.").

120. *Id.* at 407–08 ("Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law.").

121. *Id.* at 410–11.

122. *See Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES, Sept. 30, 1990, § 1, at 22.

123. *Id.*

124. *Id.*

125. *See* Sandra Torry, "Lifetime" Just Too Long for Some Federal Judges, HOUS. CHRON., Feb. 2, 1992, at A18 (noting that the Guidelines contributed to the resignation of Judge Raul Ramirez); Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1 (noting the

experienced in the pre-Guidelines sentencing regime would clear the bench and be replaced by judges who were comfortable viewing sentencing as a ministerial, computational chore rather than a judicial act freighted with political and moral responsibility.

*D. A New Hope*

Alone in dissent in *Mistretta*, recently appointed Justice Scalia argued that, because the Sentencing Commission's only mission was to write laws, its creation represented an impermissible delegation of pure legislative power.<sup>126</sup> Although he agreed that Congress had set forth detailed standards to guide the Commission,<sup>127</sup> he reasoned that those standards "are, plainly and simply, standards for further legislation."<sup>128</sup> The so-called "Guidelines" were nothing other than statutes. Moreover, Justice Scalia doubted that the question of which branch of government housed the Sentencing Commission could be settled by congressional fiat.<sup>129</sup> Years later, Justice Scalia's view of the Guidelines as statutes would prove influential enough to unravel critical aspects of the inquisitorial regime they erected.<sup>130</sup>

In the meantime, the Guidelines' extremely harsh sentences and rigidity continued to excite concern. In a 1991 special report to Congress, the Commission concluded that drug couriers and mules were receiving disproportionately severe sentences because the sentencing scheme was almost entirely predicated on drug quantity.<sup>131</sup> Congress responded in 1994 with what came to be known as the "safety-valve" provision, which gave certain first-time drug offenders a two-point offense-level reduction and relief from

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resignation of Judge John S. Martin, Jr. over Guidelines); Harry Weinstein, *For Some Jurists, High Court's Decision Brings Vindication*, L.A. TIMES, Dec. 11, 2007, at 18 (noting that the Guidelines had prompted several judges to resign).

126. See *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting) ("The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law.").

127. *Id.* at 416.

128. *Id.* at 420.

129. *Id.* at 423 ("[T]he Court must therefore decide for itself where the Commission is located for purposes of separation-of-powers analysis.").

130. Interestingly, in the decision that declared mandatory sentencing Guidelines an infringement on the right to trial by jury, the Court felt the need to emphasize that it was not adopting Justice Scalia's *Mistretta* dissent. See *United States v. Booker*, 543 U.S. 220, 242 (2005) ("Our holding today does not call into question any aspect of our decision in *Mistretta*").

131. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM G-142 (1991). The Department of Justice reached the same conclusion in its 1994 analysis of certain drug sentences: "Even for low-level defendants, the most significant determinant of their sentence was drug quantity. The defendant's role in the offense had only a small influence on the length of the eventual sentence." U.S. Dep't of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, 7 FED. SENT'G REP. 7, 7 (1994-1995).

any mandatory minimum sentence.<sup>132</sup> Extending the Guidelines' inquisitorial premise that sentencing reductions should be purchased through self-incrimination, the safety-valve provision conditioned relief on the defendant providing the prosecution with complete information regarding the crime.<sup>133</sup> Some federal judges refused to grant a reduction if the prosecution was not satisfied that the confession was complete.<sup>134</sup>

The prosecution's control over sentencing facts, particularly its power over cooperating witnesses, continued to rankle a shrinking group of judges. In the early days of the Guidelines, some federal courts even held that forbidding courts from considering a defendant's cooperation in the absence of a government motion violated due process.<sup>135</sup> To be sure, even before the Guidelines, the Executive Branch could reward a defendant's cooperation by dropping charges, granting a pardon, or conferring clemency without involving a judge.<sup>136</sup> But a defendant who did not agree with the prosecution's version of events might yet throw himself "on the mercy of the court," as the saying goes. The amended SRA, however, allowed *only* prosecutors to mitigate sentences for cooperation.<sup>137</sup> As one jurist with years of service as a federal prosecutor, a federal district court judge, and a court of appeals judge put it:

I find the authority given by the Guidelines to United States Attorneys, enabling them to control the sentencing process, to be entirely inappropriate and an invasion of the historical role of judges as the final arbiters of justice. Incredibly, we now have the inflexible prosecutorial mind which, all too often, caters to public passion, dictating sentencing parameters.<sup>138</sup>

In 1998, a Tenth Circuit panel created a national stir when it reversed a defendant's conviction because prosecutors had obtained

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132. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985-86 (codified at 18 U.S.C. § 3553(f) (2006)); see also U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (1994).

133. See 18 U.S.C. § 3553(f)(5); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(5) (1994).

134. See, e.g., *United States v. Alvarado-Rivera*, 412 F.3d 942, 947 (8th Cir. 2005) (en banc) (holding that an un rebutted proffer did not necessarily entitle a defendant to safety-valve relief).

135. See *United States v. Roberts*, 726 F. Supp. 1359, 1373-74 (D.D.C. 1989) (collecting cases); see also *In re Sealed Case*, 149 F.3d 1198, 1199 (D.C. Cir.) (holding that sentencing courts could depart downward for substantial assistance without a government motion), *vacated in part by* 159 F.3d 1362 (D.C. Cir. 1998).

136. See, e.g., *Whiskey Cases*, 99 U.S. 594, 604 (1878); *In re Wells*, 59 U.S. (18 How.) 307, 312-13 (1855).

137. See *supra* notes 95-96 and accompanying text.

138. *United States v. Jackson*, 30 F.3d 199, 205 (1st Cir. 1994) (Pettine, J., concurring).

testimony in exchange for “(1) the promise not to prosecute [the witness] for certain offenses, (2) the promise to inform Mississippi authorities of his cooperation, and (3) the promise to inform the district court of his cooperation.”<sup>139</sup> With obvious implications for the Guidelines’ inquisitorial bent, the court ruled in *United States v. Singleton* that trading charge and sentencing benefits for cooperation amounted to procuring testimony by bribery in violation of 18 U.S.C. § 201(c)(2).<sup>140</sup> Before the en banc court reversed the panel, motions to suppress cooperating-witness testimony were filed across the country—and were in most cases denied.<sup>141</sup> Despite the statute’s plain language, the courts rejecting *Singleton* reasoned that § 201(c)(2) did not apply to federal prosecutors,<sup>142</sup> that the statute must not bar plea agreements because plea agreements have been used in our criminal justice system since time immemorial,<sup>143</sup> and that interpreting the statute to preclude cooperating-witness

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139. *United States v. Singleton*, 144 F.3d 1343, 1348 (10th Cir. 1998), *vacated* 165 F.3d 1297 (10th Cir. 1999) (en banc).

140. *See id.* at 1344–56. The statute provides:

Whoever . . . directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person’s absence therefrom . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2) (2006).

141. *See, e.g.*, *United States v. Szur*, No. S5 97 CR. 108(JGK), 1998 WL 661484, at \*1–2 (S.D.N.Y. Sept. 24, 1998); *United States v. Polidoro*, No. CIV.A. 97-383-02, 1998 WL 634921, at \*5 (E.D. Pa. Sept. 16, 1998); *United States v. Durham*, No. 98-10051-02, 1998 WL 684241, at \*1 (D. Kan. Sept. 11, 1998); *United States v. Mejia*, No. 98 CR. 4(JGK), 1998 WL 598098, at \*1–2 (S.D.N.Y. Sept. 8, 1998); *United States v. Barbaro*, No. 98 CR. 412(JFK), 1998 WL 556152, at \*3 (S.D.N.Y. Sept. 1, 1998); *United States v. Juncal*, No. 97 CR. 1162(JFK), 1998 WL 525800, at \*1 (S.D.N.Y. Aug. 20, 1998); *United States v. McGuire*, 21 F. Supp. 2d 1264, 1266 (D. Kan. 1998); *United States v. Gabourel*, 9 F. Supp. 2d 1246, 1246 (D. Colo. 1998); *United States v. Dunlap*, 17 F. Supp. 2d 1183, 1184–88 (D. Colo. 1998); *United States v. Guillaume*, 13 F. Supp. 2d 1331, 1332–33 (S.D. Fla. 1998); *United States v. Eisenhardt*, 10 F. Supp. 2d 521, 521–22 (D. Md. 1998); *United States v. Reid*, 19 F. Supp. 2d 534, 535–36 (E.D. Va. 1998); *United States v. Arana*, 18 F. Supp. 2d 715, 716–21 (E.D. Mich. 1998); *United States v. Duncan*, No. Crim.A. 97-217, 1998 WL 419503, at \*1 (E.D. La. July 15, 1998). *But see* *United States v. Fraguera*, No. Crim.A. 96-0339, 1998 WL 560352, at \*1–2 (E.D. La. Aug. 27, 1998) (granting motion to suppress); *United States v. Lowery*, 15 F. Supp. 2d 1348, 1350–57 (S.D. Fla. 1998) (same).

142. *See, e.g.*, *Mejia*, 1998 WL 598098, at \*1; *Juncal*, 1998 WL 525800, at \*1; *Guillaume*, 13 F. Supp. 2d at 1334; *Reid*, 19 F. Supp. 2d at 536–38; *Arana*, 18 F. Supp. 2d at 717–18.

143. *See, e.g.*, *Mejia*, 1998 WL 598098, at \*1; *Barbaro*, 1998 WL 556152, at \*3; *Juncal*, 1998 WL 525800, at \*1; *Guillaume*, 13 F. Supp. 2d at 1334–35; *Reid*, 19 F. Supp. 2d at 538.

deals would conflict with other rules and statutes.<sup>144</sup> (None of these decisions made sense—especially given that a plea agreement that did not amount to bribery was easy enough to write.)<sup>145</sup>

Shortly after *Singleton*, a panel of the District of Columbia Circuit took a different approach to breaking the Justice Department's monopoly on cooperation reductions.<sup>146</sup> It ruled that a court may consider a defendant's cooperation without a prosecutor's motion in atypical cases.<sup>147</sup> But the court did not indicate what a "non-heartland" substantial-assistance case might be,<sup>148</sup> and the panel opinion was vacated before one ever arose.

Despite their quick repudiation, cases like *Singleton* were significant acknowledgements of the serious threat that executive control over cooperation reductions posed to the integrity of trials: it made prosecutors the ultimate arbiters of "truth" at sentencing. Controversy over the prosecutors' augmented power and the Guidelines' lengthy prison terms seemed to persuade some high-court minds of the insights underlying Justice Scalia's *Mistretta* dissent.<sup>149</sup> In a series of cases spanning six years, the Court revisited the constitutionality of the Guidelines regime.

*Jones v. United States*<sup>150</sup> asked whether a fact that increased by ten years the maximum possible penalty for carjacking (i.e., that the defendant inflicted a serious injury during the crime) was an offense element or merely a "sentencing enhancement."<sup>151</sup> The distinction was important because "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."<sup>152</sup> On the other hand, a judge could find

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144. See, e.g., *Dunlap*, 17 F. Supp. 2d at 1186–87 (finding a conflict with FED. R. CRIM. P. 35(b), 18 U.S.C. § 3553(e) (2006), and U.S. SENTENCING GUIDELINES MANUAL § 5K1.1); *Guillaume*, 13 F. Supp. 2d at 1333–34 (recognizing a conflict with the federal immunity statute, 28 U.S.C. § 994(n) (2006), and 18 U.S.C. §§ 6001–6005 (2006), in addition to a conflict with FED. R. CRIM. P. 35(b), 18 U.S.C. § 3553(e), and U.S. SENTENCING GUIDELINES MANUAL § 5K1.1).

145. The government could, for example, have committed to filing a substantial-assistance motion *regardless* of the substance of the testimony given in exchange. Similarly, it could have filed the motion *before* the witness testified. That way, a cooperating witness whose story diverged in certain respects from the government account would still be eligible for mitigation.

146. See *In re Sealed Case*, 149 F.3d 1198 (D.C. Cir.), *vacated in part by* 159 F.3d 1362 (D.C. Cir. 1998).

147. See *id.* at 1204 ("We therefore conclude that even where the government files no motion, *Koon* authorizes district courts to depart from the Guidelines based on a defendant's substantial assistance where circumstances take the case out of the relevant guideline heartland.").

148. See *id.* ("As *Koon* directs, we leave it to the district court to define the 'heartland' for a particular case.").

149. See *supra* notes 139–42.

150. 526 U.S. 227 (1999).

151. See *id.* at 230–39.

152. *Id.* at 232.



sentencing enhancements by a preponderance of the evidence. Avoiding the constitutional issue of whether any fact that increases the potential penalty for a crime is necessarily an element, Justice Souter's majority simply construed the carjacking statute as setting forth an additional element.<sup>153</sup> In a footnote, the Court dismissed the dissent's fear that the decision would render federal and state sentencing Guidelines unconstitutional, stating that at most it would "bear solely on the procedures by which the facts that raise the possible penalty are to be found, that is, what notice must be given, who must find the facts, and what burden must be satisfied to demonstrate them."<sup>154</sup> Justices Scalia and Stevens each concurred to emphasize that they believed the Sixth Amendment in fact required jury determination of any fact exposing a defendant to a higher potential penalty.<sup>155</sup>

The issue that *Jones* sidestepped came before the Court in *Apprendi v. New Jersey*.<sup>156</sup> Charles Apprendi pled guilty to three charges stemming from his firing bullets into the home of an African-American family who had moved into a white neighborhood.<sup>157</sup> Two of the counts carried a maximum penalty of ten years, and the third carried a maximum of five years. The prosecutor sought to enhance the sentence under a New Jersey statute that increased penalties for crimes animated by bias against certain groups. At the sentencing hearing, the judge heard testimony from a psychologist, various character witnesses, the arresting officer, and Apprendi himself. Crediting the officer's testimony, the judge ruled that Apprendi's crimes were racially motivated. The judge sentenced Apprendi to twelve years on the most serious count and to lesser concurrent sentences on the other two. The twelve-year sentence exceeded the ten-year statutory maximum that would have applied without the hate-crime enhancement.<sup>158</sup>

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153. *Id.* at 239–44, 251–52.

154. *Id.* at 251 n.11.

155. *See id.* at 252–53 (Stevens, J., concurring); *id.* at 253 (Scalia, J., concurring); *see also* *Monge v. California*, 524 U.S. 721, 735–37 (1998) (Stevens, J., dissenting) (rejecting the Court's approval of a retrial that would allow the prosecution to introduce evidence of an earlier offense for the purpose of enhancing a petitioner's sentence); *id.* at 737–41 (Scalia, J., dissenting) (arguing that a fact that exposes a defendant to an increased maximum sentence should be treated as an element of a criminal offense and submitted to a jury).

156. 530 U.S. 466 (2000).

157. *Id.* at 469–70.

158. *See id.* at 469–71. It did not matter that the twelve-year sentence did not exceed Mr. Apprendi's total exposure on all three counts. *Id.* at 470–71, 474 ("[T]he State has argued that even without the trial judge's finding of racial bias, the judge could have imposed consecutive sentences on counts 3 and 18 that would have produced the 12-year term of imprisonment that Apprendi received . . . . The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-

Justice Stevens, writing for the Court, held that a convicted defendant could not constitutionally be exposed to a penalty greater than that supported by the jury's verdict, the defendant's admissions, and his prior convictions.<sup>159</sup> In other words, judge-found facts could not increase a defendant's exposure regardless of whether they were denominated elements or sentencing factors:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.<sup>160</sup>

Although the New Jersey statute at issue also raised *Apprendi's* mandatory minimum sentence from five to ten years, *Apprendi's* holding was limited to sentencing ceilings and did not address whether a sentencing floor could be constitutionally raised based on judge-found facts.<sup>161</sup> The Court subsequently affirmed that *Apprendi's* rationale did not implicate mandatory minimum sentences, which can still be imposed on the basis of judge-found facts: "The minimum may be imposed with or without the factual finding; the finding is by definition not 'essential' to the defendant's punishment."<sup>162</sup>

*Apprendi's* looming implication for federal sentencing was clear, even though the opinion itself disclaimed consideration of federal sentencing procedures.<sup>163</sup> The Court had ignored Justice Scalia when he contended in *Mistretta* that the Guidelines were statutes not passed by Congress.<sup>164</sup> The issue was now repackaged as a Sixth Amendment question rather than a separation-of-powers one. Either the Guidelines were statutes creating various sentencing ranges based on the existence of certain facts or they were not. If they were, then *Apprendi* required that a jury find the facts necessary to trigger an enhanced sentence.<sup>165</sup> If they were not, then how could they purport to limit a judge's discretion to impose a sentence anywhere within the statutory range authorized by the verdict? This was not lost on Justice Breyer, who in dissent argued

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year maximum for the offense charged in that count." (citation omitted)).

159. *Id.* at 490.

160. *Id.* at 476 (quoting *Jones*, 526 U.S. at 243 n.6).

161. *Cf., e.g.*, *United States v. Smith*, 223 F.3d 554, 566 (7th Cir. 2000) (holding that a mandatory minimum sentence can be imposed based on facts found by judge).

162. *Harris v. United States*, 536 U.S. 545, 561 (2002) (reaffirming *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

163. *Apprendi*, 530 U.S. at 497 n.21.

164. *See Mistretta v. United States*, 488 U.S. 361, 413 (Scalia, J., dissenting).

165. *See Apprendi*, 530 U.S. at 490–92, 497.

that jury fact-finding was an unrealistic ideal rather than a constitutional right:

This rule would seem to promote a procedural ideal—that of juries, not judges, determining the existence of those facts upon which increased punishment turns. But the real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises, particularly in respect to sentencing.<sup>166</sup>

By this time, the federal bench was deep with judges inured to the Guidelines' defects and impeded in recognizing the problems they posed for the adversary process.<sup>167</sup> Despite *Apprendi*, the courts of appeals rejected challenges to Guidelines sentences predicated on judge-found drug quantities as long as they were below the statutory maximum.<sup>168</sup> Although the Guidelines bound district judges, appellate courts refused to treat them as statutes, clinging to the fiction that they merely guided discretion.<sup>169</sup> But, as Justice Breyer feared, the idea that the facts driving punishment could be determined bureaucratically rather than adversarially could not forever withstand the force of *Apprendi*'s rationale.

#### E. *The Executive Strikes Back*

*Apprendi* triggered a vehement backlash from the Justice Department and its congressional allies, who sensed a great threat to prosecutorial control over sentencing in the Court's jurisprudence.<sup>170</sup> In May 2002, Chief Judge James M. Rosenbaum, appointed to the District of Minnesota by President Reagan, testified before a House subcommittee against a bill that would have rejected a Sentencing Commission proposal to reduce penalties for certain drug defendants.<sup>171</sup> In a report on the bill published five

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166. *Id.* at 555–59 (Breyer, J., dissenting).

167. *See* *United States v. Green*, 346 F. Supp. 2d 259, 268 (D. Mass. 2004) (claiming that DOJ's "centrally organized efforts . . . to manipulate sentences and sentencing policy" has eroded the right to trial "while the institutional judiciary complacently slips into forms of expression and modes of thought that unconsciously reinforce the Department agenda in a powerfully Orwellian way").

168. *See, e.g., United States v. Doggett*, 230 F.3d 160, 165 (5th Cir. 2000) (affirming a 235-month sentence imposed because the judge determined that defendant manufactured 575 grams of methamphetamine).

169. *See id.* at 166 ("[T]he district judge's finding of the amount of drugs merely aided him in rendering the proper sentence within the statutory range authorized by the jury's verdict.").

170. *See Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.").

171. *See Fairness in Sentencing Act of 2002: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*,

months later, congressional conservatives, led by Representative F. James Sensenbrenner, Jr., accused the judge of giving illegally lenient sentences and misleading Congress by giving factually inaccurate accounts of the cases he discussed.<sup>172</sup> The Subcommittee began an astonishingly invasive investigation of the judge's drug-related sentencing decisions and threatened to subpoena his sentencing records, including sealed transcripts.<sup>173</sup>

While congressional conservatives targeted individual judges who imposed below-Guidelines sentences,<sup>174</sup> Congress passed legislation aimed at cowing any federal trial judge who departed below the Guidelines. In 2003, Congress approved the Feeney Amendment to a popular bill creating the Amber Alert system for publicizing possible child abductions.<sup>175</sup> The amendment was calculated to intimidate any district judge who considered imposing a sentence below what the Guidelines prescribed.<sup>176</sup> It subjected sentences to de novo appellate review and required prosecutors to report to the Department of Justice the granting of any defense motion for a downward departure.<sup>177</sup> Further, it gave the Sentencing Commission six months to amend the Guidelines "to ensure that the incidence of downward departures is substantially reduced."<sup>178</sup>

The DOJ's lobbying resulted in passage of the amendment<sup>179</sup>

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107th Cong. 19 (2002) (statement of the Hon. James M. Rosenbaum, C.J., District of Minnesota). Chief Judge Rosenbaum testified that the proposal "reorients the sentencing inquiry, for bit players, away from the quantity of drugs in the entire crime, and instead toward the perpetrator . . . more properly measur[ing] the real part these defendants play in the overall drug trafficking schemes." *Id.*

172. See H.R. REP. NO. 107-769, at 9-31 (2002). The report devotes twenty-three pages to attacking Chief Judge Rosenbaum.

173. *Id.* at 10-11, 32; *A Judicial Witch Hunt*, N.Y. TIMES, Apr. 30, 2003, at A26.

174. See, e.g., *A Judicial Witch Hunt*, *supra* note 175.

175. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (codified as amended at 18 U.S.C. § 3742(e) (2006)).

176. See *United States v. Detwiller*, 338 F. Supp. 2d 1166, 1178 & n.17 (D. Or. 2004) (referring to remarks by two senators—see 150 CONG. REC. S8573 (daily ed. July 21, 2004) (statement of Sen. Leahy); 149 CONG. REC. S5133 (daily ed. Apr. 10, 2003) (statement of Sen. Kennedy); *United States v. Kirsh*, 287 F. Supp. 2d 1005, 1006-07 (D. Minn. 2003).

177. PROTECT Act § 401(d)(1)-(2), 117 Stat. at 670; see also *United States v. Booker*, 543 U.S. 220, 261 (2005) (remedial opinion) (discussing the Feeney Amendment).

178. PROTECT Act § 401(m), 117 Stat. at 675. The Commission later made various revisions to restrict the availability of downward departures. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2003).

179. See Richman, *supra* note 41, at 1388 (stating that the Feeney Amendment is "better characterized as a DOJ project in which congressional allies willingly joined"); Stith, *supra* note 11, at 1461-63 (summarizing testimony by the Justice Department in support of the Feeney Amendment).

over strident opposition from law professors,<sup>180</sup> federal judges,<sup>181</sup> current and former members of the Sentencing Commission,<sup>182</sup> former U.S. Attorneys,<sup>183</sup> the Judicial Conference,<sup>184</sup> and various business and bar organizations. On behalf of the Conference, Justice Rehnquist wrote: “[T]he Judicial Conference believes that this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences.”<sup>185</sup>

Following the passage of the Feeney Amendment, Attorney General John Ashcroft circulated an internal memorandum stating that prosecutors

have an affirmative obligation to *oppose* any sentencing adjustments, including downward departures, that are not supported by the facts and the law. This obligation extends to all such improper adjustments, whether requested by the defendant or made *sua sponte* by the court. In particular, downward departures or other adjustments that would violate the specific restrictions of the PROTECT Act should be vigorously opposed.<sup>186</sup>

To further this policy of pressing for the maximum Guidelines sentence in every case, the Attorney General required prosecutors to

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180. Letter from Frank O. Bowman, III, Professor of Law, Ind. Univ. Sch. of Law et al., to Senator Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary & Senator Patrick Leahy, Ranking Member, Senate Comm. on the Judiciary (Apr. 2, 2003) (on file with author) (signed by a total of seventy law professors).

181. Letter from Jerome B. Simandle, Chair, Fed. Judges Ass’n Sentencing Guidelines Comm. & E. Grady Jolly, President, Fed. Judges Ass’n, to Senator Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary (Apr. 3, 2003) (on file with author) (“[T]he Feeney Amendment eviscerates fifteen years of judicial practice following the Sentencing Reform Act as well as the cooperative efforts of Congress, the Executive Branch and the Judiciary to bring about a more just sentencing system.”).

182. Letter from Judges Diana Murphy, Richard Conaboy & William Wilkins to Senators Orrin Hatch and Patrick Leahy (Apr. 2, 2003) (on file with author).

183. Letter from S. Hazard Gillespie, former U.S. Att’y, S. Dist. of N.Y. et al., to Senator Orrin G. Hatch, Chairman, Senate Comm. on the Judiciary & Senator Patrick Leahy, Ranking Member, Senate Comm. on the Judiciary (Apr. 7, 2003) (on file with author) (signed by a total of eight former U.S. Attorneys for the Eastern and Southern Districts of New York).

184. See Emily Bazelon, *With No Sentencing Leeway, What’s Left to Judge?*, WASH. POST, May 4, 2003, at B4.

185. Letter from William Rehnquist, Chief Justice, Supreme Court of the U.S., to Senator Patrick Leahy, Ranking Member, Senate Comm. on the Judiciary (undated) (on file with author).

186. Memorandum from John Ashcroft, Att’y Gen. of the U.S., to All Federal Prosecutors 3 (July 28, 2003) (on file with author), available at [http://www.nacdl.org/public.nsf/legislation/ci\\_03\\_32/\\$FILE/AG\\_Guidance\\_Stcg\\_Recs.pdf](http://www.nacdl.org/public.nsf/legislation/ci_03_32/$FILE/AG_Guidance_Stcg_Recs.pdf).

report “any adverse sentencing decision.”<sup>187</sup> The clear intent was to reinforce the Executive’s monopoly on sentencing reductions and increase the pressure on defendants to cooperate with prosecutors and agents.

These measures by Congress and the Department of Justice immediately had their intended effect on the federal judiciary. Explaining his failure to grant a downward departure in a case in which a farmer was convicted of defrauding federal farm-aid programs,<sup>188</sup> Judge Paul Magnuson, another Reagan appointee to the District of Minnesota, wrote:

This reporting requirement system accomplishes its goal: the Court is intimidated, and the Court is scared to depart. The reporting requirement has another, more invidious effect. Although the Court has a high regard for the Assistant U.S. Attorney who prosecuted this matter, there will be other cases in which the prosecutor will misuse his or her authority. Due to the requirement of reporting departures that is now in place, Courts are no longer able to stop that abuse of power. The reporting requirements will have a devastating effect on our system of justice which, for more than 200 years, has protected the rights of the citizens of this country as set forth in the Constitution. Our justice system depends on a fair and impartial judiciary that is free from intimidation from the other branches of government.<sup>189</sup>

In June 2003, Judge John S. Martin, Jr., resigned from the Southern District of New York bench after thirteen years of service.<sup>190</sup> He called the Feeney Amendment an “assault on judicial independence” and an “effort to intimidate judges to follow sentencing Guidelines.”<sup>191</sup> Explaining his resignation in the *New York Times*, Judge Martin, a Bush appointee who had been an Assistant Solicitor General and U.S. Attorney for the Southern District of New York, wrote:

Every sentence imposed affects a human life and, in most cases, the lives of several innocent family members who suffer as a result of a defendant’s incarceration. For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the

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187. *Id.*

188. *United States v. Kirsch*, 287 F. Supp. 2d 1005, 1006–07 (D. Minn. 2003), *aff’d*, No. 03-3696, 2006 WL 1596804 (8th Cir. June 2, 2006) (per curiam) (setting forth the facts of the case in greater detail).

189. *Id.* at 1006–07.

190. *See* John S. Martin Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

191. *Id.*

American system of justice.<sup>192</sup>

Many federal district judges penned opinions severely critical of the Guidelines and of the Feeney Amendment in particular.<sup>193</sup>

*F. Return of the Juries*

In *Blakely v. Washington*,<sup>194</sup> the Feeney Amendment came up against the continued insistence of Justices Scalia and Stevens that juries must find (or defendants must admit) the facts supporting a sentence. Justice Scalia held for the Court that a state could not increase a defendant's sentencing exposure under its Guidelines on the basis of judge-found facts.<sup>195</sup> "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."<sup>196</sup> Responding to the United States' argument as amicus curiae that a ruling against the State of Washington would threaten the federal Guidelines, the Court coyly noted: "The Federal [Sentencing] Guidelines are not before us, and we express no opinion on them."<sup>197</sup>

But the writing was on the wall, as Justice Breyer lamented in his dissent: "Until now, I would have thought that the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts . . . . Perhaps the Court will distinguish the Federal Sentencing Guidelines but I am uncertain

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192. *Id.*

193. *See, e.g.*, *United States v. Detwiler*, 338 F. Supp. 2d 1166 (D. Or. 2004) (invalidating portions of the Feeney Amendment); *United States v. Green*, 346 F. Supp. 2d 259, 265–66 (D. Mass. 2004), *rev'd*, 426 F.3d 64 (1st Cir. 2005); *In re Sentencing*, 219 F.R.D. 262, 263–64 (E.D.N.Y. 2004) (requiring that all sentencing hearings be videotaped to facilitate the de novo appellate review required by the Feeney Amendment); *United States v. Kim*, No. 03 Cr. 413(RPP), 2003 WL 22391190, at \*7 (S.D.N.Y. Oct. 20, 2003) (calling the Feeney Amendment an "attack on the third branch of the government"); *United States v. Dyck*, 287 F. Supp. 2d 1016, 1022 (D.N.D. 2003); *United States v. Risso*, 279 F. Supp. 2d 1001, 1002 n.1 (E.D. Wis. 2003) (disputing the premise underlying the Feeney Amendment); *United States v. Mellert*, No. CR 03-0043 MHP, 2003 WL 22025007, at \*1–2 (N.D. Cal. July 30, 2003); *see also* *United States v. Flores*, 336 F.3d 760, 768 (8th Cir. 2003) (Bright, J., concurring) (exhorting district judges to "[l]et your opinions disclose your views about the injustice in the sentencing decision or decisions you are obligated to impose by Congressional mandate and/or the Sentencing Guidelines"). *But see* *United States v. Vanleer*, 270 F. Supp. 2d 1318, 1322–23 (D. Utah 2003) (arguing that the Feeney Amendment has little practical effect).

194. 542 U.S. 296 (2004).

195. *See id.* at 305.

196. *Id.* at 306–07.

197. *Id.* at 305 n.9; *see also id.* at 308 ("This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.").

how.”<sup>198</sup> Of course, the “sentencing reform efforts” to which Justice Breyer referred were substantially his own. Departing from the strictures of judicial detachment, he suggested that the Guidelines should be preserved for functional reasons—i.e., because they were politically efficacious—notwithstanding the majority’s view of the Sixth Amendment, which he considered needlessly formalistic.<sup>199</sup>

One year after *Blakely*, the Supreme Court, in an opinion by Justice Stevens, held in *United States v. Booker* that any fact other than a prior conviction that increases the possible penalty under the Federal Sentencing Guidelines must be proved to the jury beyond a reasonable doubt or admitted by the defendant.<sup>200</sup> Because the Guidelines dictated sentences based on facts found by judges by a preponderance of the evidence, the sentencing process they created was unconstitutional.<sup>201</sup> Significantly, this ruling rendered the Guidelines themselves neither unconstitutional nor unworkable.<sup>202</sup> It required only what Justices Scalia and Stevens had promised in *Jones*—that juries, rather than judges, find the facts triggering every enhancement.<sup>203</sup>

This was unacceptable to the Guidelines system’s defenders. Rather than see the inquisitorial, bureaucratic sentencing process converted into an adversarial, jury-based one, a separate majority opinion by Justice Breyer unleashed an unprecedented and dubious power to nullify parts of the Sentencing Reform Act. This separate majority—Justice Ginsburg signed both opinions—invalidated the statutory provisions that made the Guidelines legally binding and that required de novo appellate review.<sup>204</sup> The Guidelines would henceforth be “advisory” and appellate courts would review sentences for “reasonableness.”<sup>205</sup> This appeared to restore far more discretion to sentencing judges than the Feeney Amendment had taken, but it also perpetuated the regime’s inquisitorial elements—

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198. *Id.* at 343–44 (Breyer, J., dissenting).

199. *See id.* at 343–44; Calabresi, *supra* note 9, at 637 (contrasting functionalists, “who make the law respond to certain societal ends,” with formalists, who “carr[y] out old law and thereby preserve[] its values”).

200. *See United States v. Booker*, 543 U.S. 220, 244 (Stevens, J., opinion of the Court in part).

201. *See id.* The Court found it significant that downward departures were severely circumscribed. *See id.* at 234.

202. *See id.* at 280 (Stevens, J., dissenting in part) (“[T]he vast majority of federal sentences under the Guidelines would have complied with the Sixth Amendment without the Court’s extraordinary remedy. Under any reasonable reading of our precedents, in no way can it be said that the Guidelines are, or that any particular Guidelines provision is, facially unconstitutional.”); *id.* at 299 (“Our holding that *Blakely* applies to the Sentencing Guidelines did not dictate the Court’s unprecedented remedy.”).

203. *See id.* at 278–79.

204. *See id.* at 259–61 (Breyer, J., opinion of the Court in part).

205. *Id.* at 261–63, 266.



especially the use of probation officers as court inquisitors.<sup>206</sup>

Justice Breyer's opinion was aimed at preserving the orderliness of the "real-conduct" system of sentencing that the Sentencing Commission had devised.<sup>207</sup> To that end, he adopted a remedy calculated, as Justice Scalia noted, to encourage the courts of appeals to continue requiring sentences within the applicable Guidelines range even though the Guidelines were not binding.<sup>208</sup> As Justice Stevens pointed out, however, to the extent that "real-conduct" sentencing was at odds with the Sixth Amendment, the Court was duty bound to sacrifice it.<sup>209</sup>

The remedial majority did not vindicate the Justice

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206. See *United States v. Hunt*, 459 F.3d 1180, 1182 (11th Cir. 2006) ("The upshot of the Court's handiwork is that the Guidelines remain in place in an advisory capacity and must be 'consider[ed]' along with the other sentencing goals laid out in 18 U.S.C. § 3553(a)." (alteration in original) (quoting *Booker*, 543 U.S. at 259 (Breyer, J., opinion of the Court in part))). Coincidentally, this is the system that Senator Edward M. Kennedy, the chief sponsor of the Sentencing Reform Act of 1984, originally envisioned for federal sentencing. See STITH & CABRANES, *supra* note 9, at 41 (describing Senator Kennedy's initial sentencing-reform bills).

207. See *Booker*, 543 U.S. at 246 (Breyer, J., opinion of the Court in part) (stating that advisory Guidelines would maintain "a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve"); *id.* at 263–65 (arguing that extraordinary remedy of excision would further goals of honesty, uniformity, and proportionality in sentencing); *id.* at 299 (Stevens, J., dissenting in part) ("[I]n the name of avoiding any reduction in the power of the sentencing judge vis-à-vis the jury . . . the majority has erased the heart of the SRA . . ."); *id.* at 304 (Scalia, J., dissenting in part) ("[T]he opinion concludes . . . that Congress was so attached to having judges determine 'real conduct' on the basis of bureaucratically prepared, hearsay-riddled presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old-fashioned process of having juries find the facts that expose a defendant to increased prison time." (emphasis omitted)); *id.* at 329, 331–32 (Breyer, J., dissenting in part) (stating that application of the Sixth Amendment to the Guidelines risks, among other things, "unwieldy trials" and that Guidelines "are not statutes" but rules that "reflect, organize, rationalize, and modify an old set of judicially determined pre-Guidelines sentences").

208. See *id.* at 311–12 (Scalia, J., dissenting in part) ("[T]he remedial majority's gross exaggerations . . . may lead some courts of appeals to conclude—may indeed be designed to lead courts of appeals to conclude—that little has changed . . . . A court of appeals faced with this daunting prospect might seek refuge in the familiar and continue (as the remedial majority invites, though the merits majority forbids) the 'appellate sentencing practice during the last two decades.'" (footnote call numbers omitted) (quoting *id.* at 262 (Breyer, J., opinion of the Court in part))); *id.* at 311 ("The worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines and 'unreasonableness' review will function in practice.").

209. See *id.* at 288 (Stevens, J., dissenting in part) ("[M]y preferred holding would undoubtedly affect 'real conduct' sentencing in certain cases. This is so because the goal of such sentencing—increasing a defendant's sentence on the basis of conduct not proved at trial—is contrary to the very core of *Apprendi*.").

Department's interest in Draconian Guidelines. To the contrary, Justice Breyer rejected DOJ's proposed remedy because it "would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences."<sup>210</sup> Instead, advisory Guidelines loosened the executive's grip on cooperation reductions, threatening its ability to extract favorable testimony from defendants. As Guy Lewis, the former acting U.S. Attorney for the Southern District of Florida and a former Justice Department official, told a Miami newspaper, "The harsh nature of sentences has a direct relationship to a defendant's desire to cooperate. But now things have changed."<sup>211</sup>

DOJ's response was to attempt to obviate *Booker's* impact. Deputy Attorney General James Comey exhorted federal prosecutors to "take all steps necessary to ensure adherence to the Sentencing Guidelines."<sup>212</sup> That meant perpetuating Ashcroft's policies of charging defendants with the crimes carrying the highest possible penalties in every case, opposing leniency in all but extraordinary cases, appealing sentences lower than what prosecutors requested, and reporting judges who departed downward.<sup>213</sup> Prosecutors began including in all plea agreements "*Booker* waivers"—stipulations that defendants agreed to be sentenced as though the Guidelines were binding and to waive sentencing appeals.<sup>214</sup> In addition, prosecutors were given "*Booker* Sentencing Report Forms" to fill out whenever a judge sentenced below the recommended range.<sup>215</sup>

The point of Justice Breyer's *Booker* majority was to save "real-offense" sentencing by keeping control of the facts with the meddling court inquisitor whom *Blakely* denounced. Understood as a rejection of inquisitorial mechanisms in favor of adversarial litigation, *Blakely* really *was* fundamentally about the role of juries.<sup>216</sup> It forcefully criticized the probation officer's inquisitorial role and undue influence over the facts, complaining that sentences (in the State of Washington) were "based not on facts proved to [a

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210. *Id.* at 266 (Breyer, J., opinion of the Court in part).

211. Dan Christensen, *South Florida Federal Judges Free at Last*, DAILY BUS. REV. (Miami), May 9, 2005.

212. Memorandum from James B. Comey, Deputy Att'y Gen. of the U.S., to All Fed. Prosecutors 1 (Jan. 28, 2005) (on file with author).

213. *Id.* at 2–3.

214. See Christensen, *supra* note 211; see also *Blakely v. Washington*, 542 U.S. 296, 310 (2004) ("If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.").

215. See Julie Kay, *Not So Free After All*, DAILY BUS. REV. (Miami), Apr. 3, 2006.

216. *But see* Stith, *supra* note 11, at 1478 ("Thus the debate between Justice Scalia and Justice Breyer in *Blakely* was not *really* about whether there should be greater reliance on jury trials.").

defendant's] peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong."<sup>217</sup> Justice Breyer's "inventiveness" in *Booker*<sup>218</sup> kept control of the facts in the Probation Office rather than restoring it to the parties, as Justices Stevens and Scalia would have.

### III. THE SAGA CONTINUES

Contrary to claims that *Blakely* and *Booker* together increase a defendant's power vis-à-vis the prosecutor's,<sup>219</sup> *Booker*'s remedial opinion perpetuates a system that erodes defendants' adversarial rights by subordinating *both* parties to a probation officer. But for the *Booker* remedial majority, prosecutors and defendants would plea bargain based on what the government could prove—either to jurors at trial or to a judge at sentencing. The presumption of validity accorded the facts and recommendations in the presentence investigation report would be moot. The parties would have to resolve cases based on their respective estimates of what the government could prove. Requiring proof of facts to a jury thus substantially impacts every case—including those resolved through plea bargaining.<sup>220</sup>

The propriety of Justice Breyer's participation in *Booker*, as well as in some of the cases leading up to it, has rightly been questioned.<sup>221</sup> Shortly after the Guidelines' enactment, then-Judge Breyer wrote a majority opinion for the First Circuit affirming a challenged sentence.<sup>222</sup> Although the parties apparently had not raised the issue, Justice Breyer took it upon himself to write an additional opinion on whether, as a member of the Sentencing Commission, he should have recused himself.<sup>223</sup> He invited Massachusetts's U.S. Attorney and Federal Public Defender (who did not represent the defendant) to brief the issue. The government opined that a judge who is also a member of the Sentencing Commission need not recuse himself from an ordinary sentencing appeal but should recuse himself "where there is a substantial challenge, whether constitutional or not, mounted against the

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217. *Blakely*, 542 U.S. at 311–12.

218. See Stith, *supra* note 11, at 1480.

219. See *id.* at 1478 (stating that *Blakely* and *Booker* provided defendants "with additional rights that would, to some extent, counterbalance the power that the prosecutor had gained under the Guidelines regime").

220. Cf. *id.* at 1478 (stating that *Blakely* "was not really about whether there should be greater reliance on jury trials" because Scalia recognized that *Blakely* "would not necessarily result in more trials at all" (emphasis omitted)).

221. See, e.g., Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513 (2005); Mauro, *supra* note 75.

222. *United States v. Wright*, 873 F.2d 437, 439–45 (1st Cir. 1989).

223. *Id.* at 445–47 (Breyer, J., writing separately).

existence of the Guidelines system and hence of the Sentencing Commission itself.”<sup>224</sup> Justice Breyer concluded that he would not “*automatically* recuse myself in *typical* Guidelines cases, unless they involve a serious legal challenge to the Guidelines themselves.”<sup>225</sup>

When *Booker* came before the Supreme Court, Justice Breyer apparently believed that, as he was no longer on the Sentencing Commission, there was no reason for him to recuse himself. He requested confirmation of this from New York University Law School Vice Dean Stephen Gillers.<sup>226</sup> Years earlier, Dean Gillers had written a letter of support when Justice Breyer’s ethics became an issue at his Supreme Court confirmation hearings.<sup>227</sup> He informed Justice Breyer that “[t]here is no longer any reasonable basis to question your impartiality on the issue of the validity of the Guidelines.”<sup>228</sup> This opinion was not universal. On the contrary, Justice Breyer was quite naturally perceived as having a personal stake in the matter because of the work he had invested in creating the Guidelines.<sup>229</sup> Reporting on the *Booker* oral argument, *New York Times* veteran Supreme Court reporter Linda Greenhouse wrote:

Justice Breyer is the court’s strongest advocate for the Guidelines. He played a leading role in their development as a Senate staff member and later as a member of the sentencing

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224. *Id.* at 446–47.

225. *Id.* at 447.

226. *See* Mauro, *supra* note 75.

227. *See Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 336–44 (1994) (letter from Stephen Gillers, Professor of Law, New York University School of Law, to Sen. Joseph R. Biden, Chairman, S. Comm. on the Judiciary). *See generally* Neil A. Lewis, *Taking Initiative, Nominee Defends Conduct as Judge*, N.Y. TIMES, July 13, 1994, at A1 (discussing ethical questions raised at Judge Breyer’s Senate confirmation hearings).

228. Mauro, *supra* note 75; *see also* Freedman, *supra* note 221, at 530–31 (characterizing Dean Gillers’s letter as “superficial”).

229. *See, e.g.*, Freedman, *supra* note 224, at 530 (calling Justice Breyer the “primary architect” of the Guidelines” and noting that “he ‘single-handedly wrote the concept of the [G]uidelines we now have’” (alteration in original) (quoting Naftali Nendavid, *Judicial Traitor or Consensus Builder? Breyer’s Role as Sentencing Pioneer Still Rankles*, LEGAL TIMES, May 16, 1994, at 7)). This point merits elaboration beyond what this Article permits. It should at least be noted now that whether a judge’s “impartiality might reasonably be questioned,” 28 U.S.C. § 455(a) (2006), is to be determined “from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.” *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J., statement) (denial of cert.). Justice Breyer’s involvement in drafting the Guidelines would certainly seem to bring his objectivity regarding their constitutionality into question. *Cf.* 28 U.S.C. § 455(b)(3) (2006) (requiring recusal where a judge “has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy”).

commission. In contrast to his usual air of wry good cheer, Justice Breyer appeared weary and somewhat forlorn as the argument progressed.<sup>230</sup>

Justice Breyer himself had conceded his partiality a few years earlier: “Despite the criticism of the Guidelines, and even recognizing the bias that might arise from my own participation in the creation of the Guidelines, I remain cautiously optimistic about their future . . . . I would not recommend a return to pre-Guidelines practice.”<sup>231</sup>

Far from “recharg[ing] the sentencing judge” and creating an opportunity for sentencing law to evolve,<sup>232</sup> the *Booker* remedy perpetuated the Guidelines’ inimical inquisitorial process. Sentencing judges, unaccustomed to taking personal responsibility for their sentences, proved overwhelmingly reluctant to exercise their restored power to deviate from the Guidelines.<sup>233</sup> The climate of intimidation endured, with congressmen discussing legislation to circumvent *Booker* and judges speaking anonymously of fearing reversal by appellate courts or reactionary legislation.<sup>234</sup> A report by the Sentencing Commission examining sentences during the year after *Booker* was decided revealed that the huge majority of sentences were still within the Guidelines.<sup>235</sup> This is troubling given Commissioner Robinson’s revelation that the original Guidelines

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230. Linda Greenhouse, *Justices Show Inclination to Scrap Sentencing Rules*, N.Y. TIMES, Oct. 5, 2004, at A14. Press reports are admittedly not dispositive of whether the § 455(a) standard for recusal has been met. See *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 923–24 (2004) (Scalia, J., mem.). But, in contrast to the brouhaha over Justice Scalia’s hunting trip with Vice President Cheney, see *id.*, Ms. Greenhouse’s report relates incontrovertible facts regarding Justice Breyer’s responsibility for the Guidelines. Her questioning his impartiality seems eminently reasonable.

231. Breyer, *supra* note 76, at 35.

232. Stith, *supra* note 11, at 1480–82 (internal quotation marks omitted).

233. See Christensen, *supra* note 211 (discussing a study conducted by the Sentencing Commission that suggested that judges “continue to believe that the Guidelines remain appropriate in most cases”). Professor Stith all but concedes this as she notes that “[m]any [sentencing] judges may still treat the Guidelines as ‘presumptive.’” Stith, *supra* note 11, at 1483 n.272. This glosses over the much more germane fact that in every case the probation officer’s report fixes the starting point for discussion.

234. See Kay, *supra* note 215.

235. See U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 46–47 (2006) [hereinafter FINAL REPORT ON THE IMPACT OF *BOOKER*]. As Professor Stith notes, there has been an increase in the granting of defense requests for downward departures after *Booker*, see Stith, *supra* note 11, at 1487 & n.293, but the small purported increase in departures does not mitigate the fundamental problem that sentences continue to be determined through a process that is not adversarial. Moreover, it is not clear that much has changed because of *Booker*. See Richman, *supra* note 41, at 1411–12 (observing that “the response of sentencing judges to the discretionary license offered by *Booker* has been rather measured”).

imposed harsher sentences than judges imposed under indeterminate sentencing.<sup>236</sup> The report also indicated that appellate courts were generally reversing below-Guidelines sentences as unreasonable and thus discouraging the exercise of independent judgment<sup>237</sup>—exactly as Justice Scalia implied in *Booker* that Justice Breyer’s majority intended.<sup>238</sup> Most courts of appeals, in fact, expressly held that a Guidelines sentence was presumptively correct and would be affirmed.<sup>239</sup>

In a failed 2007 attempt to resolve the issue, a splintered Supreme Court effectively encouraged trial and appellate courts to continue treating the Guidelines as advisory in name only. In *Rita v. United States*,<sup>240</sup> the Court decided that an appellate court could—but did not have to—asccribe a presumption of reasonableness to a Guidelines sentence.<sup>241</sup> Justice Breyer’s majority opinion did nothing more than prod judges to stick to the Guidelines he helped draft:

Rita may be correct that the presumption will encourage sentencing judges to impose Guidelines sentences. But we do not see how that fact could change the constitutional calculus. Congress sought to diminish unwarranted sentencing disparity. It sought a Guidelines system that would bring about greater fairness in sentencing through increased uniformity. The fact that the presumption might help achieve these congressional goals does not provide cause for holding the presumption unlawful as long as the presumption remains constitutional. And, given our case law, we cannot conclude that the presumption itself violates the Sixth Amendment.<sup>242</sup>

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236. See Robinson, *supra* note 81, at 3175.

237. FINAL REPORT ON THE IMPACT OF *BOOKER*, *supra* note 235, at 29–30.

238. See *United States v. Booker*, 543 U.S. 220, 311–12 (2005) (Scalia, J., dissenting in part); *supra* note 208.

239. See *Rita v. United States*, 551 U.S. 338, 346 (2007) (listing federal circuits that apply a “presumption of reasonableness for within-Guidelines sentences”; e.g., *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006); *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005)). *But see, e.g.*, *United States v. Hunt*, 459 F.3d 1180, 1185 (11th Cir. 2006) (“We . . . see no basis for ascribing a presumption one way or the other.”); *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (“We do not find it helpful to talk about the Guidelines as ‘presumptively’ controlling or a Guidelines sentence as ‘per se reasonable’ . . .”).

240. 551 U.S. 338 (2007).

241. Justice Breyer’s majority opinion framed this issue this way: “The most important question before us is whether the law *permits* the courts of appeals to use this presumption.” *Id.* at 341 (Breyer, J., opinion of the Court in part) (emphasis added).

242. *Id.* at 354.

In separate opinions, Justices Scalia and Souter contended that the majority's approval of a presumption of reasonableness would encourage judges to continue imposing sentences justified by judge-found facts, undermining *Booker*.<sup>243</sup> Both agreed that, to preserve *Apprendi*'s vindication of the Sixth Amendment, district courts needed assurance "that the entire sentencing range set by statute is available to them."<sup>244</sup> They disagreed only as to whether eliminating the presumption of reasonableness would help achieve this goal.<sup>245</sup> Most importantly, they agreed that the *Booker* remedial opinion had so undermined *Apprendi* and *Blakely* that further action was required. Justice Scalia advocated limiting appellate review to the procedural matter of whether the district judge had considered permissible factors, thus freeing judges from the fear of reversal because an appellate panel preferred a different sentence.<sup>246</sup> Justice Souter called for Congress to require that juries find facts necessary to increase a Guidelines range.<sup>247</sup>

Accepting the *Booker* remedial opinion as law though he had not joined it, Justice Stevens parted with Justices Scalia and Souter and concurred with the *Rita* majority. He agreed, however, that district judges should feel free to use the discretion *Booker* restored.<sup>248</sup> Justice Stevens simply did not believe the *Rita* holding would necessarily discourage departures, noting that deference was owed "whether the resulting sentence is inside or outside the advisory Guidelines range, under traditional abuse-of-discretion

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243. See *id.* at 370 (Scalia, J., concurring in part and concurring in the judgment) ("The only way to assure district courts that they can deviate from the advisory Guidelines, and to ensure that judge-found facts are never legally essential to the sentence, is to prohibit appellate courts from reviewing the *substantive* sentencing choices made by district courts."); *id.* at 391 (Souter, J., dissenting) ("Without a powerful reason to risk reversal on the sentence, a district judge faced with evidence supporting a high subrange Guidelines sentence will do the appropriate factfinding in disparagement of the jury right and will sentence within the high subrange."). Justice Thomas joined Justice Scalia's opinion. *Id.* at 368 (Scalia, J., concurring in part and concurring in the judgment).

244. *Id.* at 373 n.3 (Scalia, J., concurring in part and concurring in the judgment) (quoting *id.* at 391 (Souter, J., dissenting)).

245. Compare *id.* at 391 (Souter, J., dissenting) ("Taking the *Booker* remedy (of discretionary Guidelines) as a given, however, the way to avoid further risk to *Apprendi* and the jury right is to hold that a discretionary within-Guidelines sentence carries *no* presumption of reasonableness."), with *id.* at 373–74 n.3 (Scalia, J., concurring in part and concurring in the judgment).

246. See *id.* at 281–83 & n.6 (Scalia, J., concurring in part and concurring in the judgment) ("Specifically, I would limit reasonableness review to the sentencing *procedures* mandated by statute.").

247. See *id.* at 392 (Souter, J., dissenting) ("If Congress has not had a change of heart about the value of a Guidelines system, it can reenact the Guidelines law to give it the same binding force it originally had, but with provision for jury, not judicial, determination of any fact necessary for a sentence within an upper Guidelines subrange.").

248. See *id.* at 361–62 & n.2 (Stevens, J., concurring).

principles.”<sup>249</sup> Acknowledging that *Booker* had not occasioned much practical change, he added, “Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory.”<sup>250</sup>

Writing for the Court the following term in *Gall v. United States*, Justice Stevens made the point more bluntly: “We now hold that, while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”<sup>251</sup> The Court held that a sentence of thirty-six months of probation in a case where the Guidelines recommended thirty to thirty-seven months’ imprisonment was reasonable and not an abuse of discretion, overturning the Eighth Circuit’s finding that the departure was out of proportion to the sentencing judge’s reasons.<sup>252</sup> In his concurrence, Justice Scalia again objected to “appellate review of sentences for substantive reasonableness” but allowed that the “highly deferential standard adopted by the Court today will result in far fewer unconstitutional sentences than the proportionality standard employed by the Eighth Circuit.”<sup>253</sup>

Federal prosecutors, however, continue to bring arguments that *Gall* was meant to foreclose. For example, the government recently petitioned for and received en banc reconsideration of an Eleventh Circuit panel opinion affirming a 210-month sentence for a defendant who had videotaped and photographed himself having sex with minors overseas.<sup>254</sup> Conceding that the sentence had been imposed without procedural error, the government maintained that the sentence, which was 150 months below what the Guidelines recommended, was substantively unreasonable because the judge’s explanation for the departure was unsatisfactory.<sup>255</sup> This position is effectively an attempt to short-circuit *Booker* and *Gall* by eroding the deferential standard of review already dictated by the Supreme Court. The government would effectively limit judges’ ability to depart downward by narrowing the acceptable justifications.

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249. *Id.* at 366.

250. *Id.* at 367.

251. *Gall v. United States*, 552 U.S. 38, 40 (2007).

252. *See id.* at 43–46.

253. *Id.* at 60 (Scalia, J., concurring); *see also* *Kimbrough v. United States*, 552 U.S. 85, 113 (2007) (Scalia, J., concurring) (“[T]he district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines.”).

254. *United States v. Irely*, 563 F.3d 1223, 1224–25 (11th Cir.), *reh’g granted and opinion vacated* 579 F.3d 1207 (11th Cir. 2009).

255. *Id.* at 1226.



## IV. THE GUIDELINES' LEGACY: SENTENCING BY INQUISITION

The sentencing process that Justice Breyer helped create and steadfastly defends assumes that an absolute, objective truth about each case, first, exists and, second, is knowable.<sup>256</sup> These twin false premises allow the former professor of administrative law to conceive of the Guidelines as an evenhanded regime promising efficiency with no offsetting unfairness: “The administrative rules at issue here, Federal Sentencing Guidelines, focus on *sentencing facts*. They circumscribe a federal judge’s discretion with respect to such facts, but in doing so, they do not change the nature of those facts.”<sup>257</sup> Even if the objective facts of each case could be ascertained, the success of the endeavor would depend entirely upon the process used to weigh and reconcile competing subjective perspectives on events. A sentencing judge deciding what probably happened based on a subordinate’s “neutral” and unrestrained investigation would reach different conclusions than she would if she had to be convinced beyond a reasonable doubt based on only admissible evidence.<sup>258</sup> The Guidelines ignore the fact that the Constitution has already selected the method of determining the facts of each criminal case.

As a result, although the Guidelines are now but one statutory factor that sentencing judges must consider, sentencing remains fundamentally inquisitorial because the Guidelines regime shapes the facts that make their way into every presentence investigation report. These facts not only determine the recommended guideline range but also inform the application of *every* statutory sentencing factor, tainting even sentences that depart from the Guidelines range. The report provides the presumptively orthodox version of what happened and what kind of person the defendant is, which are the inputs used to decide whether the defendant merits any reprieve from the presumptive recommended sentence.

The post-*Booker* Guidelines process remains inquisitorial in three specific ways that converge to create an unconstitutional and unreliable sentencing process: First, the defendant’s “help” or “cooperation”—beguiling terms deployed to veil the Guidelines’

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256. See STITH & CABRANES, *supra* note 9, at 133; Stith, *supra* note 11, at 1451 & n.118.

257. United States v. Booker, 543 U.S. 220, 328 (2005) (Breyer, J., dissenting in part).

258. See *id.* at 304 (Scalia, J., dissenting in part) (“[T]he [majority] opinion concludes . . . that Congress was so attached to having judges determine ‘real conduct’ on the basis of bureaucratically prepared, hearsay-ridden presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old-fashioned process of having juries find the facts that expose a defendant to increased prison time.”); *id.* at 299 (Stevens, J., dissenting in part) (“[I]n the name of avoiding any reduction in the power of the sentencing judge vis-à-vis the jury . . . the majority has erased the heart of the [Sentencing Reform Act].”).

irreverence for adversarial norms—is both demanded and expected while “putting the government to its burden” is condemned.<sup>259</sup> Second, the Guidelines encourage and lavishly reward denunciations of the most dubious sort.<sup>260</sup> Finally, a court inquisitor is tasked to investigate defendants, create the official version of the facts without evidentiary restrictions, calculate Guidelines ranges, and advocate for particular sentences—activities incompatible with the neutrality the Constitution presupposes the federal judiciary will keep.<sup>261</sup> For these reasons, the Guidelines system remains, after *Booker*, fundamentally incompatible with the adversarial system on which defendants’ rights—including the rights to due process, counsel, trial by jury, and confrontation of witnesses—are premised.

A. *The High Price of Trials*

The Guidelines give even a defendant with a viable defense strong incentive to waive trial by offering a substantial across-the-board sentencing reduction to all defendants who plead guilty.<sup>262</sup> Viewed against the backdrop of the harsh schedule of sentences the Guidelines prescribe, the acceptance-of-responsibility reduction effects an abridgement of the right to trial. In addition, the provision vitiates the constitutional guarantee of presumption of innocence because, as a practical matter, the government’s mere accusation can induce a guilty plea even on equivocal evidence. While defendants admitting guilt received lower sentences before the Guidelines, those defendants could be said to have exhibited contrition and thus demonstrated a reformed character relevant to the then-existing rehabilitative regime. The Guidelines, in contrast, offer no rationale for sacrificing their stated goal of uniformity to reward trial waivers.

The original two-point acceptance-of-responsibility reduction gave most defendants about a 20% reduction for pleading guilty. That suggests that, putting collateral consequences of a conviction (such as reduced employability, loss of civil rights, or deportation) aside, a defendant would go to trial only if he believed that his chance of acquittal was at least 20%.<sup>263</sup> Offering defendants facing

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259. *See infra* Part IV.A.

260. *See infra* Part IV.B.

261. *See infra* Part IV.C.

262. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a)–(b) (2009).

263. A first-time offender with an offense level of 24 would expect his sentence to be 51 months (on the low end) if convicted and 41 months (again on the low end) if he pled guilty under the original Guidelines. He would choose to go to trial only if he thought he had a 20% chance of acquittal because at that point the expected value from trial is equivalent to his expected value from a guilty plea:

$$E(X) = (51 \text{ months} \times 80\% \text{ odds of conviction}) + (0 \text{ months} \times 20\% \text{ odds of acquittal}) = 40.8 \text{ months}$$

sentences above offense level 15 a third point<sup>264</sup> raised the prison-term discount to about 28%, meaning a defendant who believed the government had only a 72% chance of convicting him would plead guilty.<sup>265</sup>

These calculations assume a sentence at the low end of the applicable range whether the defendant risks trial or pleads guilty. In fact, a defendant who goes to trial is more likely to receive a sentence above the low end of the range, making trials even more fraught with risk. Furthermore, by testifying at trial, a defendant risks a two-level obstruction-of-justice enhancement if his testimony contradicts the government's allegations.<sup>266</sup> The cost of trial for such a defendant is expensive indeed: A defendant who believes that, if convicted after testifying at trial, he will receive an obstruction-of-justice enhancement and be sentenced at the high end of the Guidelines must believe that he has better-than-even odds of winning—at least a 52% chance—to exercise his trial “right.” When the cost of losing at trial is that high, trials can hardly be characterized as something to which every defendant is entitled.

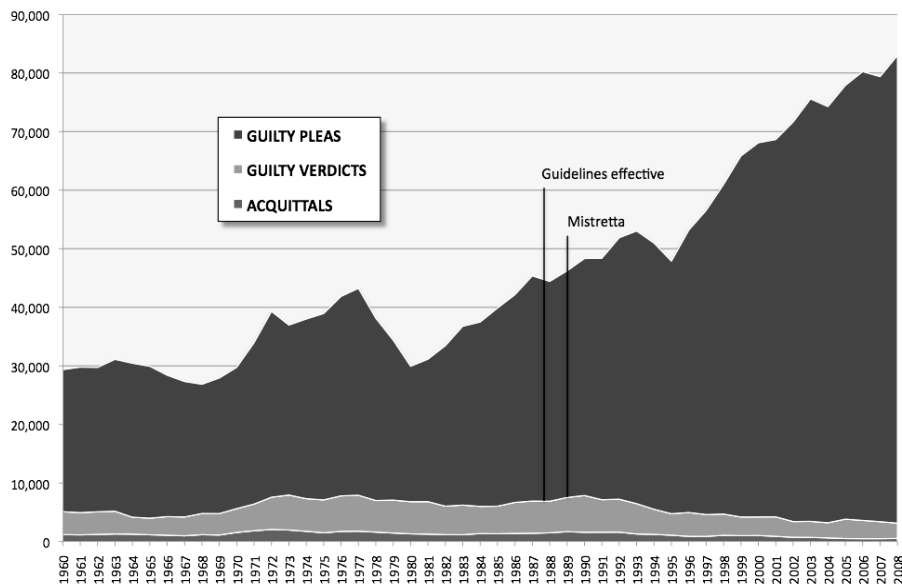
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264. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2009) (“If the defendant qualifies for a decrease under [§ 3E1.1(a), the ‘acceptance-of-responsibility’ requirement], the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.” (emphasis omitted)).

265. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 130–34 (2005) (explaining how the Guidelines’ harsh sentences and substantial discounts for pleading guilty distorted federal prosecution outcomes).

266. See U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2009).

FIGURE: ADJUDICATED FEDERAL CRIMINAL CASES 1960–2008



While in practice calculating a potential sentence may involve other provisions, such as mandatory consecutive punishments for using a firearm in certain crimes,<sup>267</sup> it is undeniable that the rigidity of the Guidelines imposes real costs on the right to trial. The available data bears out this analysis. The data show that since the Guidelines went into effect the total number of federal cases brought has dramatically increased.<sup>268</sup> All of the additional cases—plus many cases that previously proceeded to trial—ended in guilty pleas. In 2008, federal prosecutors tried fewer than half as many cases as they did in 1980 despite a two-and-a-half-fold increase in the number of cases.<sup>269</sup> The reason for the overwhelming increase in

267. See 18 U.S.C. § 924(c) (2006).

268. See Wright, *supra* note 265, at 90.

269. Professor Ronald F. Wright has done an extraordinary job of demonstrating that “[t]he drop in acquittals over the last thirty years flags some serious doubts about the quality of justice in the federal system today.” *Id.* at 84. The figure appearing *supra* was created using data from the statistical appendix to Professor Wright’s article, as well as more current figures for the years 2003 through 2008 from the annual reports prepared by the Director of the Administrative Office of the U.S. Courts. See Ronald F. Wright, *Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background* app. 1 (Wake Forest Univ. Legal Studies Paper, Sept. 2005), available at <http://ssrn.com/abstract=809124>; ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.D-4, available at <http://www.uscourts.gov/judbususc/judbus.html> (compiling statistics concerning “[Criminal] Defendants Disposed of, by Type of Disposition and Major Offense” in U.S. District Courts).

guilty pleas is that the Guidelines force defendants to opt for the sentence imposed for “accepting responsibility” or risk a drastically higher sentence for the chance of an acquittal.<sup>270</sup> Unlike plea bargaining in the pre-Guidelines regime, however, prosecutors and defense attorneys have little influence over the Guidelines options because the real-conduct system makes the relative strength of the government’s case irrelevant.

Such extraordinary pressure to admit guilt makes no sense in a retributive justice system that purports to prize uniformity in punishment above all else. In a rehabilitative system, one that tailors punishment to an individual’s particular likelihood of reforming, an act of contrition may indicate progress toward reform and hence make a lower sentence appropriate. Assuming that admitting guilt fosters rehabilitation, such a system may impose on those who maintain their innocence a longer period of rehabilitative incarceration, deny them counseling that hastens release,<sup>271</sup> or deny them parole—though they may turn out to be innocent.<sup>272</sup> In a retributive system, which designedly ignores a defendant’s prospects for reform, admitting guilt and expressing remorse are simply irrelevant to the amount of punishment an offense merits. That is not to say that a logical argument for imposing a lower sentence on one who pleads guilty in a retributive system is inconceivable.<sup>273</sup> But any such argument necessarily subordinates uniformity to some other societal value—which is incompatible with the Guidelines system as a whole. Consequently, the Sentencing Commission has never attempted to justify the anachronistic reduction for pleading guilty on *any* basis.<sup>274</sup>

The most likely explanation for why the Guidelines drafters, who obsessively pursued sentencing uniformity, so conspicuously

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270. See *United States v. Green*, 346 F. Supp. 2d 259, 265–66 (D. Mass. 2004) (“[T]he focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.”); *id.* at 270 (“In the District of Massachusetts, an individual who stands up to the Department and insists on a jury trial gets, upon conviction, a sentence 500 percent longer than a similarly situated defendant who pleads guilty and cooperates.”).

271. See *McKune v. Lile*, 536 U.S. 24, 35 (2002) (plurality opinion) (holding that requiring inmates to make admissions that could expose them to additional prosecutions as a condition for participating in an inmate sexual-abuse treatment program did not violate the Fifth Amendment).

272. See Adam Liptak, *The Nation; Not at All Remorseful, but Not Guilty Either*, N.Y. TIMES, Nov. 3, 2002, at 4 (discussing the cases of several people incarcerated for extended periods because they maintained innocence who were later exonerated by DNA evidence).

273. See, e.g., Wright, *supra* note 265, at 110 (“Granted, the public normally should repay a defendant for the savings of trial preparation and court resources that flow from a guilty plea.”).

274. Indeed, a plurality of the Supreme Court assumed in dicta as late as 2002 that the rationale for the acceptance-of-responsibility reduction was to reward those who attempt to reform. See *McKune*, 536 U.S. at 47.

compromised their primary objective is that making trials costly was the best way (short of repealing the right to trial) to achieve their secondary objective of efficiency. Apparently incognizant that rights—particularly trial rights—are *meant to be* obstacles to efficiency, the Commissioners built into their system the premise that trials are resource-intensive formalities imposed upon prosecutors and judges by inconsiderate defendants. The acceptance-of-responsibility reduction is thus denied for “put[ting] the government to its burden,”<sup>275</sup> suggesting that most defendants know they are guilty yet stubbornly refuse to confess. This forces prosecutors to waste time building cases and judges to waste time presiding over trials. The underlying premise of the acceptance-of-responsibility provision appears to be that trials are reserved for the very few innocent defendants, whose lack of guilt will inevitably and invariably be appreciated by the jury. It is no surprise then that far fewer defendants are interested in exercising their trial “right” under the Guidelines than before the Guidelines.<sup>276</sup>

The reality, of course, is that trials do not exist simply to sort the guilty from the not guilty. A defendant may be willing to admit to *some* of the acts of which the government accuses him. “Some” can mean some charges but not others, some elements of the charge but not others, some goals of a conspiracy but not others, some amount of fraud but less than the government claims, or any combination of innumerable similar permutations.<sup>277</sup> Furthermore, a defendant may in fact be innocent and yet face a very serious risk that a jury will erroneously convict—as the Supreme Court has expressly recognized.<sup>278</sup> The Guidelines ignore the fact that government agents and prosecutors are very often wrong about the particulars of charged crimes—and it is those very details that drive Guidelines sentences up. Precisely because the parties will disagree on many of the specifics, a defendant has traditionally been able to plead guilty to a *charge* without admitting anything about the manner in which the crime was committed.<sup>279</sup> Because there is almost never an absolute truth that the parties to a criminal case

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275. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.2 (2009).

276. See *supra* notes 268–70 and accompanying text.

277. See *North Carolina v. Alford*, 400 U.S. 25, 33 (1970) (“[S]ince ‘guilt, or the degree of guilt, is at times uncertain and elusive,’ ‘[a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty . . . .’” (alteration in original) (quoting *McCoy v. United States*, 363 F.2d 306, 308 (D.C. Cir. 1966))).

278. See *id.* at 37–38 (holding that a conviction and sentence may be imposed upon a defendant who pleads guilty to limit his exposure at sentencing while nonetheless denying that he committed the crime charged).

279. See *id.* at 32 (noting that “the defendant’s admission that he committed the crime charged against him” suffices to support a conviction “even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment”).

can amicably agree upon, efficiency in a real-conduct system of determinate sentencing can come only at the expense of fairness.

Imposing a lower sentence on a defendant who pleads guilty has long been an accepted part of federal criminal justice,<sup>280</sup> but the Guidelines significantly altered the backdrop against which the Supreme Court approved plea bargaining. Before the Guidelines, the Court carefully distinguished between a defendant's hope for mitigation at sentencing if he pled guilty and a guarantee of a harsher sentence if he insisted on a trial. *Brady v. United States* held that a guilty plea entered in the expectation that the government would drop some charges or in the hope that the judge would be more lenient was not unconstitutionally coerced.<sup>281</sup> Importantly, the Court noted that its decision did not address "the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty."<sup>282</sup> The decision, rather, was predicated on the "mutuality of advantage" that a guilty plea offers the prosecution, whose resources are conserved, and "a defendant who sees slight possibility of acquittal."<sup>283</sup> *Brady*, furthermore, distinguished the Court's decision in *United States v. Jackson*, which invalidated, on Fifth and Sixth Amendment grounds, a provision of a federal statute authorizing the execution of kidnappers convicted by a jury but not those convicted by bench trial or guilty plea.<sup>284</sup> *Jackson* stated that "the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them."<sup>285</sup>

*Jackson* and *Brady* together hold that a statute exposing a defendant to a greater punishment solely because he exercises his right to trial by jury is unconstitutional. At least until *Booker* was decided, the acceptance-of-responsibility guideline did just that. Even now, it is difficult to accept that the acceptance-of-responsibility guideline does not violate *Jackson* by encouraging defendants to waive their trial rights for the sake of mere

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280. See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW § 1.4, at 22 (3d ed. 2000).

281. See *Brady v. United States*, 397 U.S. 742, 751 (1970).

282. *Id.* at 751 n.8 ("In *Brady's* case there is no claim that the prosecution threatened prosecution on a charge not justified by the evidence or that the trial judge threatened *Brady* with a harsher sentence if convicted after trial in order to induce him to plead guilty.").

283. *Id.* at 752; accord *Alabama v. Smith*, 490 U.S. 794, 802–03 (1989) (stating that plea bargaining is premised on the parties' "mutual interests"). Congress, however, may perhaps be able constitutionally to provide a direct benefit for guilty pleas. See *Corbitt v. New Jersey*, 439 U.S. 212, 221 (1978) (rejecting a constitutional challenge to a New Jersey statutory scheme removing a mandatory minimum life sentences for defendants who pled guilty to murder charges).

284. See *Brady*, 397 U.S. at 746–47; *United States v. Jackson*, 390 U.S. 570, 572, 581 (1968).

285. *Jackson*, 390 U.S. at 583.

government economy. Furthermore, by drastically slashing the expected recommended Guidelines sentence, the acceptance-of-responsibility provision encourages guilty pleas from defendants who have far better than a “slight possibility of acquittal”<sup>286</sup> in apparent contravention of *Brady*. As the data show, the Guidelines encourage guilty pleas from defendants who have fair-to-good chances of acquittal on the implicit premise that they are *probably* guilty of something, even if it is not exactly what the government alleges.<sup>287</sup>

Even assuming that advisory Guidelines somehow cure the *Jackson* defect, the post-*Booker* Guidelines have an enduring, built-in *Brady* problem because they changed the conditions in which plea decisions are made. Before the Guidelines, the Court relied on two premises to explain why imposing shorter sentences on defendants who pled guilty did not infringe their trial rights. The first was that sentences following a guilty plea resulted from arms-length bargaining between the prosecution and the defense, who were presumed to have roughly equal bargaining power.<sup>288</sup> The second was that the sentencing judge could well conclude that a defendant who pled guilty was more amenable to rehabilitation than one who denied his guilt.<sup>289</sup> Under the Guidelines (whether mandatory or advisory), neither of these justifications applies because the parties’ ability to negotiate is deliberately thwarted by the interpolation of a probation officer and because the defendant’s rehabilitative prospects are irrelevant.

The constitutionality of lower sentences for defendants who forego trial was, prior to adoption of the Guidelines, carefully premised on the parties to the criminal case having roughly equal bargaining power. This was implicit in Justice White’s discussion regarding “mutuality of advantage” in *Brady*.<sup>290</sup> A year after *Brady*, in *Santobello v. New York*,<sup>291</sup> the Court reaffirmed this premise. It vacated a sentence because the prosecutor breached a promise made in a plea agreement to refrain from making any sentencing recommendation.<sup>292</sup> The Justices divided over whether the defendant was entitled to withdraw his plea or merely to enforce his agreement, but the entire Court agreed that all of the justifications for plea bargaining “presuppose fairness in securing agreement

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286. *Brady*, 397 U.S. at 752 (emphasis added).

287. See fig. *supra* p. 44; *supra* notes 268–70 and accompanying text.

288. See *Bodenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978) (stating that the prosecutor and defendant each has “his own reasons for wanting to avoid trial” (citing *Brady*, 397 U.S. at 752) and that both “arguably possess relatively equal bargaining power” (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting))).

289. See *infra* note 301 and accompanying text.

290. See *Brady*, 397 U.S. at 752.

291. 404 U.S. 257 (1971).

292. *Id.* at 262–63.



between an accused and a prosecutor.”<sup>293</sup>

The Guidelines are designed to upset this balance by adopting a real-conduct sentencing regime designed to marginalize the parties’ participation in the fact-finding process and relying instead on a probation officer. The parties are expected to “accurately state the facts” to the probation officer, who “will then prepare a report describing the offense accurately on the basis of what counsel have told him.”<sup>294</sup> As a result, the Guidelines deny prosecutors much of their former ability to bargain. Furthermore, they require the defendant to confess not merely his guilt but the details of the crime as well, essentially requiring him to agree with the prosecutor’s allegations and the probation officer’s “factual” conclusions. Each defendant essentially confronts an identical Hobson’s choice between trial and no trial rather than being able to negotiate a resolution based on the relative strength of the government’s case.<sup>295</sup>

The Court’s other historical justification for allowing defendants who waive trial to serve shorter sentences was that a guilty plea reflects amenability to reform. In *Brady*, the Court stated that pleading guilty demonstrated the defendant “is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period than might otherwise be necessary.”<sup>296</sup> *Santobello* likewise counted among the justifications for bargaining the fact that speedy disposition “enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.”<sup>297</sup> Offering *any* reduction to defendants who plead guilty is fundamentally inconsistent with the Guidelines’ goal of uniformity and real-conduct sentencing. It is a barely veiled truth that the reduction exists only for the reason that *Jackson* held constitutionally impermissible: to encourage defendants to waive their right to a jury trial.<sup>298</sup> The Guidelines’ drafters attempted to skirt this difficult constitutional issue by phrasing the provision vaguely enough to barely allow the possibility that the reduction was in the judge’s discretion,<sup>299</sup> but the

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293. *Id.* at 261.

294. Breyer, *supra* note 76, at 30; *see also* Wilkins, *supra* note 50, at 190 (stating that the Guidelines “require full disclosure of the actual conduct of the defendant” and that “truth in sentencing will not be sacrificed under any circumstances”).

295. *See* Blakely v. Washington, 542 U.S. 296, 338 (2004) (Breyer, J., dissenting) (criticizing plea bargaining as “a system in which punishment is set not by judges or juries but by advocates acting under bargaining constraints”).

296. *Brady v. United States*, 397 U.S. 742, 753 (1970).

297. *Santobello*, 404 U.S. at 261.

298. As one district judge stated during a sentencing hearing, “Basically, that is a whole guideline inducement to facilitate pleading guilty and to sweeten the pot.” *United States v. Ochoa-Gaytan*, 265 F.3d 837, 842 (9th Cir. 2001) (quoting sentencing transcript).

299. *See* Breyer, *supra* note 76, at 29 (stating that the Guidelines were deliberately vague as to what constitutes acceptance of responsibility and left

revisions since 1987 have destroyed even that pretense.

Judge Breyer attempted to justify the acceptance-of-responsibility reduction as simply a reflection of “actual past practice.”<sup>300</sup> It is not. The Guidelines annihilated the prior sentencing context. They expressly sought to eliminate plea bargaining altogether by insisting on punishing real conduct. Guilty pleas are no longer the result of the “mutuality of advantage” between the parties (which *Brady* condoned<sup>301</sup>) but rather of the guarantee of a harsher sentence—a *much* harsher sentence—for a defendant who insists on a trial (which *Jackson* condemned<sup>302</sup>). The Guidelines made the right to trial extremely costly and thus unattractive to all but those who are highly confident that the government cannot prove its case and those whose crimes are so heinous that the penalty will not significantly vary. As *Jackson*, *Brady*, and *Santobello* make clear, it was certainly not “actual past practice” to foreclose negotiation and instead give defendants a take-it-or-leave-it choice between trial and no trial. It is, however, more *efficient*. Of course, an efficient criminal justice system that considers trials a waste of time and resources is precisely the evil that the Sixth Amendment targeted.

Nonetheless, under the Guidelines, federal courts—oblivious to the irony in judges viewing trials as wasteful formalities—have been disquietingly agreeable to viewing “put[ting] the government to its burden” as a condemnable act.<sup>303</sup> In one case, the First Circuit held that the filing of pre-trial motions could vitiate a defendant’s acceptance of responsibility “if the effect of the motions was to force the government to prepare for trial or if the motions placed

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reductions to the discretion of the trial judge to avoid constitutional problems); Wilkins, *supra* note 50, at 191 & n.64 (suggesting that the Sentencing Commission viewed the constitutionality of offering a lower sentence to defendants who pled guilty as depending upon whether the sentencing judge had discretion to impose an identical sentence regardless of whether the defendant waived trial).

300. See Breyer, *supra* note 76, at 28.

301. See *Brady*, 397 U.S. at 752.

302. See *United States v. Jackson*, 390 U.S. 570, 582–83 (1968).

303. The reason for this may be that many federal judges are engaged in processing cases rather than deliberating over and deciding issues:

Case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal. Quantity has become all important; quality is occasionally mentioned and then ignored. . . .

Proponents of management may be forgetting the quintessential judicial obligations of conducting a reasoned inquiry, articulating the reasons for decision, and subjecting those reasons to appellate review—characteristics that have long defined judging and distinguished it from other tasks.

Resnik, *supra* note 17, at 431 (footnote call numbers omitted). Although Professor Judith Resnik’s article focused on civil litigation, she recognized that “[t]he desire for speed and early settlement” pervades the federal criminal docket as well. *Id.* at 432.

unreasonable or unusually heavy burdens upon the government.”<sup>304</sup> Even courts that have recognized the constitutional problems that the acceptance-of-responsibility provision may raise have nonetheless unquestioningly accepted that causing the government to prepare for trial is censurable.<sup>305</sup>

*B. Rewards for “Cooperating-Witness” Testimony*

Self-incrimination pays off under the Guidelines, but the real coin of the Guidelines realm is incriminating information about other people. By making a government substantial-assistance motion virtually the only escape from a harsh sentence, the Guidelines transformed the federal criminal justice system into a treacherous bazaar of accusations.<sup>306</sup> As one district judge wrote:

This court is probably one of the few judges left who served as a U.S. District Judge more years before the sentencing Guidelines than with the sentencing Guidelines in full force and effect.

. . . .

. . . [I]n the 10-plus years since the sentencing Guidelines went into full force and effect in the federal court system, we have come to a situation where the institutions of the Bureau of Prisons are basically anthills of snitches, each one trying to figure out how to work a deal whereby the government will bestow a “get out of jail early” card upon them in the form of a Rule 35 motion.<sup>307</sup>

Because the Guidelines reward confessions and testimony against others to the exclusion of practically everything else, the few defendants who insist on a trial face the highly dubious testimony of convicts hoping to earn their release. This is an additional disincentive for any defendant to exercise his trial right. While the

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304. *United States v. Marroquin*, 136 F.3d 220, 224 (1st Cir. 1998).

305. *See, e.g.*, *United States v. Ochoa-Gaytan*, 265 F.3d 837, 842–43 (9th Cir. 2001); *United States v. Gilbert*, 138 F.3d 1371, 1373–74 (11th Cir. 1998); *United States v. McConaghy*, 23 F.3d 351, 353 (11th Cir. 1994) (“Avoiding trial preparation and the efficient allocation of the court’s resources are descriptions of the desirable consequences and objectives of the guideline.”).

306. *See Gleeson, supra* note 40, at 640 & n.4 (“[T]he Guidelines transformed the recruitment of accomplice witnesses from a painstaking art into a booming industry. I was investigating and prosecuting gangsters at the time, and it revolutionized the way we did business.”).

307. *United States v. Sepe*, 1 F. Supp. 2d 1372, 1375–76 (S.D. Fla. 1998), *rev’d in part, vacated in part*, 168 F.3d 506 (11th Cir. 1999); *see also United States v. Forney*, 9 F.3d 1492, 1503 (11th Cir. 1993) (“As drafter of plea agreement provisions providing potential 5K1.1 motions for substantial assistance and decisionmaker as to whether such assistance has occurred, the government has an enhanced negotiating position in plea bargaining and plea agreements.”).

Guidelines did not pioneer sentencing reductions for cooperators,<sup>308</sup> discarding the rehabilitative theory of punishment made the practice philosophically unsound. Making cooperating *to the government's satisfaction* virtually the only escape from an exorbitant sentence was an invitation to perjury.

Prior to the Guidelines' enactment, the Supreme Court held in *Roberts v. United States* that cooperation with law enforcement was relevant to sentencing *only* because it demonstrated potential for rehabilitation.<sup>309</sup> It was common ground among the Justices and the parties that "cooperation with the authorities is a 'laudable endeavor' that bears a 'rational connection to a defendant's willingness to shape up and change his behavior.'"<sup>310</sup> The majority added, "By declining to cooperate, petitioner rejected an 'obligatio[n] of community life' that should be recognized before rehabilitation can begin."<sup>311</sup> *Roberts*, more to the point, was predicated on the Court's "modern conception" that the overriding purpose of incarceration was rehabilitation.<sup>312</sup> Thus, after explaining that cooperation suggests a reformed attitude, the Court allowed that the defendant's claim that he did not cooperate for fear of retaliation or self-incrimination "would have merited serious consideration" had he presented it to the trial court.<sup>313</sup>

The Guidelines have no rationale for giving prosecutors the power to permit a sentencing reduction for cooperation. It is not that a retributive theory of punishment could not rationally reward cooperation. One might argue, of course, that by cooperating with authorities a defendant pays the debt he owes society for his crime and thus offsets his sentence. One problem with that argument, however, is that American society does not generally view the informer as particularly virtuous. As Justice Marshall observed in *Roberts*:

[O]ur admiration of those who inform on others has never been as unambiguous as the majority suggests. The countervailing social values of loyalty and personal privacy have prevented us from imposing on the citizenry at large a duty to join in the

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308. See *United States v. Singleton*, 165 F.3d 1297, 1301 (10th Cir. 1999) (en banc) (acknowledging the "longstanding practice" of granting leniency to accomplices in exchange for their testimony against their "confederates").

309. See *Roberts v. United States*, 445 U.S. 552, 557-58 (1980).

310. Compare *id.* at 557 (quoting petitioner's brief), with *id.* at 570-71 (Marshall, J., dissenting) ("[I]t is fully appropriate to encourage such behavior by offering leniency in exchange for 'cooperation.' Cooperation of that sort may be a sign of repentance and the beginning of rehabilitation." (footnote call numbers omitted)).

311. *Id.* at 558 (majority opinion) (alteration in original) (quoting Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 437 (1958)).

312. *Id.* at 556.

313. *Id.* at 559.

business of crime detection. If the Court's view of social mores were accurate, it would be hard to understand how terms such as "stool pigeon," "snitch," "squealer," and "tattletale" have come to be the common description of those who engage in such behavior.<sup>314</sup>

More fundamentally, even if betraying others to help oneself were considered virtuous, the retributive argument does not justify the Guidelines making the prosecutor the arbiter of whether a defendant's cooperation merits a reward. Whether the prisoner has paid for his crime is precisely the sort of question that a neutral judge is in the best position to decide.<sup>315</sup> Predicating the credit on the prosecutor's motion suggests a quid pro quo of testimony in exchange for liberty, just as the Tenth Circuit panel found in *Singleton*.<sup>316</sup>

There is, in fact, disturbing evidence that cooperating witnesses are only too willing to say anything that will earn them a substantial-assistance motion and that prosecutors at least sometimes realize that the testimony they are rewarding is highly untrustworthy.<sup>317</sup> The Guidelines have legitimized "cooperation" to such an extent that prosecutors and judges now believe that the government is entitled to leverage information from defendants. In one manifestation of this, a district judge imposed a more severe sentence on a defendant because she would not cooperate against her husband in an unrelated case.<sup>318</sup> Even such scandalous arrangements as paying bounties to witnesses have become acceptable.<sup>319</sup>

The Justice Department's habitual reliance on cooperating-

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314. *Id.* at 569–70 (Marshall, J., dissenting).

315. The Guidelines require a prosecutor's motion for a substantial-assistance reduction but leave the amount of the reduction to the judge. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009); *see also* FED. R. CRIM P. 35(b).

316. *United States v. Singleton*, 144 F.3d 1343, 1348 (10th Cir. 1998), *overruled*, 165 F.3d 1297 (10th Cir. 1999) (en banc).

317. *See, e.g.*, *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005) (describing a scheme in which drug kingpins set up bogus drug deals that authorities were made aware of to receive substantial-assistance credit from prosecutors); *United States v. Manske*, 186 F.3d 770, 774, 776 (7th Cir. 1999) (stating that the government knowingly made a star witness out of a man who had repeatedly threatened violence against those who might testify against him); David Adams, *Dr. B and Group 43*, ST. PETERSBURG TIMES, May 4, 2003, at 1A (detailing Operation Millennium, in which a rogue Drug Enforcement Administration informant received millions of dollars from drug traffickers in exchange for negotiating their surrender as "cooperating witnesses" and light sentences).

318. *See United States v. Burgos*, 276 F.3d 1284, 1287 (11th Cir. 2001) (vacating the sentence and remanding for resentencing).

319. *See, e.g.*, *United States v. Dawson*, 425 F.3d 389, 393 (7th Cir. 2005) (holding that the government's payment of a twenty percent cash bounty to a drug-sale informant did not disqualify the informant from testifying), *amended by* 434 F.3d 956 (7th Cir. 2006).

witness testimony brought public criticism that more culpable defendants were testifying against underlings, resulting in “prisons . . . filling up with common addicts and small-time criminals.”<sup>320</sup> Websites—notably WhosARat.com—began publishing reports and profiles of snitches as well as federal agents.<sup>321</sup> Such websites pool information on informants and agents that would otherwise be dispersed in court files across the country.<sup>322</sup> The information is organized into profiles that can help defense lawyers impeach government witnesses at trial. Sean Bucci, who was convicted on federal marijuana charges in Boston, started WhosARat.com after being indicted in 2004.<sup>323</sup> The website claims its purpose is to serve as a resource for defendants investigating potential witnesses.<sup>324</sup>

Evidencing its commitment to perpetuating rewards for cooperation, DOJ scrambled to suppress the backlash, insisting that cooperating witnesses are victims rather than scoundrels. Michael Battle, then-head of the U.S. Attorney’s Executive Office,<sup>325</sup> asked the federal judiciary to remove all plea agreements from the electronic public docket of every federal court. In a letter to the Judicial Conference, he wrote that “we are witnessing the rise of a new cottage industry engaged in republishing court filings about cooperators on websites such as [www.whosarat.com](http://www.whosarat.com) for the clear

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320. John Lang, *Sentencing Rules Demoralize Jurists*, ROCKY MTN. NEWS (Denver), Nov. 23, 1997, at 3A; see also Aaron Epstein, *Drug Sentencing Draws Wrath of Judges*, TIMES-PICAYUNE (New Orleans), May 19, 1991, at A18 (“The most culpable defendants have something to offer . . . and are able to walk away, while the mules . . . end up doing the time.” (internal quotation marks omitted)).

321. See *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1301 (M.D. Ala.) (denying a government motion for an order requiring the defendant to take down a website depicting government agents and witnesses and asking readers for information pertaining to his defense) (“[W]hile the website certainly imposes discomfort on some individuals, it is not a serious threat sufficient to warrant a prior restraint on [the defendant’s] speech or an imposition on his constitutional right to investigate his case.”), *order supplemented by* 326 F. Supp. 2d 1303 (M.D. Ala. 2004).

322. “Snitching” has more recently become its own subfield of study. Professor Alexandra Natapoff of Loyola Law School, who was formerly an assistant federal public defender in Baltimore, started *Snitching Blog* in August 2009, a weblog devoted to the study of how rewarding cooperation affects the legal system and society. See Alexandra Natapoff, *Welcome to Snitching Blog*, SNITCHING BLOG, Aug. 11, 2009, [http://www.snitching.org/about\\_snitching\\_blog/](http://www.snitching.org/about_snitching_blog/).

323. Adam Liptak, *Web Sites Expose Informants, and Justice Dept. Raises Flag*, N.Y. TIMES, May 22, 2007, at A1.

324. See *Who’s A Rat*, Disclaimer, <http://www.whosarat.com/disclaimer.php> (last visited Apr. 3, 2010).

325. Mr. Battle was involved in the politically motivated firings of several U.S. Attorneys in 2007 and resigned during the scandal. See David Stout & David Johnston, *A Top Aide to Gonzales Resigns, Becoming Latest Fallout Casualty*, N.Y. TIMES, Apr. 7, 2007, at A1; Jerry Zremski, *Battle Depicted as ‘Yes’ Man in Firings*, BUFF. NEWS, Sept. 30, 2008, at B1.

purpose of witness intimidation, retaliation, and harassment.”<sup>326</sup>

The Justice Department never contended, however, that any witness was hurt because of any website. In two separate news reports, DOJ officials attempted to support their stance with reference to a single low-tech incident in Philadelphia where fliers were posted in a drug courier’s neighborhood stating that he was cooperating with prosecutors.<sup>327</sup> Public comments solicited by the judiciary and posted on the U.S. Courts website reflected a variety of opinions about sealing plea agreements, but none disputed that cases of actual witness intimidation are rare.<sup>328</sup> Defense attorneys responding to the request for comments and media inquiries agreed that witness intimidation is in fact a rarity while cooperation agreements are not.<sup>329</sup> Critics of the proposal also pointed out that plea agreements would still be available at the court clerk’s office, allowing anyone truly motivated to intimidate witnesses to do so.<sup>330</sup>

Given that keeping plea agreements off the Internet would not prevent witness intimidation and that having them available electronically has not occasioned any actual intimidation, DOJ’s professed motivation is doubtful. It seems more likely that the Department of Justice wants to keep valuable, truthful information about its witnesses away from defense attorneys, juries, and the public. Tellingly, Mr. Battle’s letter to the Judicial Conference stated, “[T]he posting of photographs of cooperating witnesses on websites such as ‘whosarat’ has greatly exacerbated the concern that cooperators will be publicly identified, stigmatized, and harmed.”<sup>331</sup>

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326. Letter from Michael A. Battle, Dir., Executive Office for U.S. Att’ys, to James C. Duff, Sec’y, Judicial Conference of the U.S. 2 (Dec. 6, 2006), *available at* [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/06/06-2136/Filed\\_01-31-2007\\_ProsecutorsSupplementalCommentsAppendix.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2136/Filed_01-31-2007_ProsecutorsSupplementalCommentsAppendix.pdf).

327. Liptak, *supra* note 323; Theresa Cook & Jason Ryan, ‘Who’s a Rat’: Intimidation or Information?, ABC NEWS, May 25, 2007, <http://abcnews.go.com/print?id=3209627>.

328. See Comments Received by the Administrative Office of the United States Courts in response to Request for Comment on Privacy and Public Access to Electronic Case Files (Fall 2007), <http://www.privacy.uscourts.gov/2007comments.htm> (last visited Apr. 3, 2010) (summarizing comments).

329. See, e.g., Marcia Coyle, *Internet Access Policy*, DAILY BUS. REV. (Miami), Sept. 19, 2007 (quoting a defense attorney stating that the DOJ approach “presumes every cooperating witness is in danger and every accused person not cooperating is a danger to witnesses” but noting that “[t]he fact is [witness intimidation is] a rare occurrence”); Posting of Fred Williams to Comments Received by the Administrative Office of the United States Courts in response to Request for Comment on Privacy and Public Access to Electronic Case Files (Fall 2007) (Oct. 10, 2007), <http://www.privacy.uscourts.gov/2007text.htm#56> (comments of Fred Williams, former Assistant U.S. Attorney, Charlotte, N.C., stating, “Those rare circumstances where the defendant’s cooperation needs to be explained under seal to protect the defendant can be readily handled under current law and practice.”).

330. See, e.g., Coyle, *supra* note 329.

331. Letter from Michael A. Battle to James C. Duff, *supra* note 326, at 5.

Any risk of harm being utterly speculative, none of these justifications gives rise to a legitimate concern. In an open criminal justice system, cooperators *ought to be* “identified” as well as “stigmatized” if the public deems them ignoble. The public has the right to monitor and evaluate how DOJ exercises its power to reduce sentences, to evaluate the types of people who receive reductions, and ultimately to decide whether DOJ ought to have this power. By monopolizing the ability to digitally agglomerate data about cooperators, DOJ shields its sentencing practices and the quality of cooperating-witness testimony from study or scrutiny not only by defendants and their counsel but by the press and academics as well.

Prosecutors’ control over substantial-assistance reductions (together with the acceptance-of-responsibility guideline’s requirement of a cleansing confession) signals to defendants that their only hope for sentencing relief is to admit to the government’s allegations and corroborate its suspicions of others. As a result, the adversarial system is compromised for everyone. A defendant stalwart or confident enough to proceed to trial will confront witnesses—whether longtime associates or transient detention-center cellmates—eager to corroborate the government’s allegations. Thus, it cannot be argued that the Guidelines’ inquisitorial methods serve only to eliminate wasteful trials of guilty people. (Indeed, the notion that *any* trial is wasteful is an affront to the common-law system itself.) The Guidelines’ inquisitorial shortcuts around the common law’s inefficient safeguards contaminate *every* federal criminal trial by inviting perjured denunciations, compounding the pressure on all defendants to plead guilty by raising the likelihood of a Draconian postverdict sentence.

### C. *Inquisitorial Fact-Finding*

Had it not been for Justice Breyer’s *Booker* majority, juries would be required to find every fact used to enhance a sentence. Factual disputes would be resolved through adversarial testing during trials in which the Confrontation Clause and the Federal Rules of Evidence would protect the defendant.<sup>332</sup> Probation officers would have no reason to interview defendants, calculate Guidelines ranges, or recommend sentences. They would in fact play no role. Instead, the prosecution and the defense would make their sentencing presentations directly to the judge, who would fix an appropriate sentence based on facts admitted or proven beyond a reasonable doubt. This would be true regardless of whether the

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332. See *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004) (holding that the Confrontation Clause bars admission of testimonial statements not tested by cross-examination). *But see* FED. R. EVID. 1101(d)(3) (stating that the Federal Rules of Evidence “other than with respect to privileges” do not apply at sentencing hearings).



Guidelines were binding, advisory, or nonexistent. With or without Guidelines, the process would be adversarial. To the Justices in *Booker*'s remedial majority—who prioritized an efficient, “real-conduct” sentencing regime over the sentencing uniformity offered by mandatory Guidelines—this was the worst possible outcome.<sup>333</sup>

The Guidelines system, after *Booker* just as before *Booker*, relegates the parties' involvement with sentencing to “cooperating” with the probation officer's unrestrained investigation and appealing his findings and recommendations to the judge. Probation officers are the heart of the inquisitorial sentencing machine because real-conduct sentencing could not be achieved by relying on the lawyers for each side to present their best case, as the adversary system characteristically does. The parties could not be trusted not to bargain. Nor could judges be relied upon to undertake personally to investigate defendants or charges. For one thing, a judge would hesitate to force a defendant to divulge information that would be used against him. For another, judges would be far more apt to do what judges typically do—rely on the parties to present whatever evidence they wanted for or against a particular sentence. This would make real-conduct sentencing impossible because the defendant could keep critical information to himself and because the parties would remain in a position to bargain.

Real-conduct sentencing thus required conscripting probation officers to serve as court inquisitors—rather than phasing out the presentence investigation report along with parole, the other vestige of pre-Guidelines rehabilitative sentencing. The extensive biographical information that had previously been used to gauge a defendant's rehabilitative prospects was retained,<sup>334</sup> although it was no longer of any consequence, probably to give the appearance of business as usual. The newly mandatory reports became the authoritative recounting of the conduct underlying the charges of conviction, of any other charged or uncharged criminal conduct, and of the presumptive Guidelines calculation.

The artifice worked.<sup>335</sup> Federal courts readily deferred to

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333. *Cf.* *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (“The founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”).

334. OFFICE OF PROBATION AND PRETRIAL SERVS., ADMIN. OFFICE OF THE U.S. COURTS, PUBL'N NO. 107, THE PRESENTENCE INVESTIGATION REPORT III-24 (2006).

335. Professor Stith points out that “in most cases where the government and the defense agreed on the Guidelines calculation . . . neither the probation officer nor the judge had any incentive or evidence to upset the agreement that the litigants presented.” Stith, *supra* note 11, at 1449. Most cases, however, do not present agreed-upon sentences. Even when agreements are reached, they are hashed out within the context of the inquisitorial Guidelines, with the parties well aware that the probation officer will present facts the parties might otherwise agree not to present. As a matter of fact, courts before and after

probation officers' inquisitorial findings—regardless of whether they were supported by evidence or whether the government and defendant agreed—solely because probation officers were judicial employees and not parties to the case.<sup>336</sup> The courts rejected every challenge to probation officers' new role as advocates on the inane formalistic ground that, as court employees, they were "neutral."<sup>337</sup> In one case, the Seventh Circuit found that probation officers routinely sitting at the prosecution table and advocating for government-favored positions created only a "perception" of partiality that could be dispelled by separate seating.<sup>338</sup>

Probation officers are adversarial to a defendant in the same

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*Booker* reject agreed-upon sentences in reliance on facts uncovered by the probation officer. *See, e.g.*, *United States v. Cole*, 569 F.3d 774, 775 (7th Cir. 2009) (affirming a sentence of double the agreed-upon prison term based on the probation officer's contention that the money the defendant forfeited should be converted into drug quantity and used to enhance the Guidelines sentence); *United States v. Fraza*, 106 F.3d 1050, 1055–56 (1st Cir. 1997) (affirming a denial of an unopposed minor-role downward adjustment based on an ex parte conversation between the judge and the probation officer during the sentencing hearing); *United States v. Bennett*, 990 F.2d 998, 1000, 1005 (7th Cir. 1993) (affirming a career-offender sentence although "[b]oth the government and [the defendant] objected to the career offender finding in light of the stipulation in the plea agreement that [the defendant] was not a career offender" based on the probation officer's discovery of an additional prior conviction).

336. *See, e.g.*, *United States v. Woods*, 907 F.2d 1540, 1544 (5th Cir. 1990) ("[W]e reject [the defendant's] suggestion that the probation officer in his case acted in a prosecutorial capacity simply because he recommended that the court consider a higher quantity of drugs than that stipulated by the prosecutor."); *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1435 (9th Cir. 1990) ("[D]espite defense counsel's argument that the defendant's letter to the court indicated acceptance of responsibility, and despite the government's indication that it did not have any strong objections to a finding of acceptance of responsibility, the court stuck with its decision not to upset the finding by the probation officer." (internal quotation marks omitted)); *id.* at 1437 (Leavy, J., concurring in part and dissenting in part) ("[T]he [district] court deferred to the presentence report, informing the defendant that he failed to participate in a presentence interview at his own risk and that the findings of the probation officer would not be disturbed."); *United States v. Gaines*, 888 F.2d 1122, 1123–24 & n.3 (6th Cir. 1989) (stating that it is appropriate for a probation officer to make sentencing recommendations in disregard of the parties' agreement); *United States v. McAlpine*, 832 F. Supp. 1426, 1431 (D. Kan. 1993) ("A preponderance of the evidence simply means proof that something is more likely so than not so. As an officer of the court, the probation officer may be considered a reliable source.").

337. *See, e.g.*, *United States v. Byers*, 100 F. App'x 139, 142 (4th Cir. 2004) ("Throughout the process of interviewing a defendant, preparing a presentence report, and discussing the report during a presentence conference with the court, a probation officer is a neutral, information-gathering agent of the court, not an agent of the prosecution."); *United States v. Jackson*, 886 F.2d 838, 844 (7th Cir. 1989) ("A federal probation officer is an extension of the court and not an agent of the government. The probation officer does not have an adversarial role in the sentencing proceedings.").

338. *United States v. Turner*, 203 F.3d 1010, 1014 (7th Cir. 2000).

way and for the same reason that police and prosecutors are. Police and prosecutors are said to be partial only because it is their job to uncover and apprehend criminals and their interest in achieving particular results may cloud their objectivity.<sup>339</sup> What makes courts impartial, on the other hand, is that they *do not investigate crimes or defendants* and theoretically at least are agnostic as to whether a defendant is convicted or acquitted. Probation officers, on the other hand, *do* actively investigate defendants and charges. It is their Guidelines-given function to uncover information that a defendant would not choose to disclose for sentencing and advocate for every applicable sentencing enhancement. Not surprisingly then, the United States Probation Office describes its function as “providing protection to the public”—just as police and prosecutors do.<sup>340</sup>

Admittedly, then, the Guidelines’ probation officer, bearing no resemblance to John Augustus and his successors,<sup>341</sup> is not there to do what is in the defendant’s best interests but to enforce the law and protect the public. That the probation officer formally or technically works for the Judicial Branch is (for the same reason that Justice Scalia’s *Mistretta* dissent disregarded Congress’s designating the Sentencing Commission a judicial agency<sup>342</sup>) irrelevant.<sup>343</sup> A functional rather than formalistic examination of the probation officer’s role throughout the Guidelines’ sentencing process reveals that the probation officer serves as nothing less than the court’s inquisitor. Probation officers question the defendant about his background and conduct, visit the defendant’s home, interview relatives and associates, obtain and review financial and other confidential records, resolve factual issues without adversarial testing, and argue for a particular outcome.<sup>344</sup> A federal district judge who personally undertook any, much less all, of these tasks

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339. See, e.g., *Johnson v. United States*, 333 U.S. 10, 14 (1948) (contrasting a “neutral and detached magistrate” with “zealous officers” who are “engaged in the often competitive enterprise of ferreting out crime”). This, incidentally, is the same reason why Justice Breyer, having devoted substantial time and work to creating the Federal Sentencing Guidelines, simply cannot be neutral or objective where their continued viability is at stake.

340. PRESENTENCE INVESTIGATION REPORT, *supra* note 334, at I-I (“As a component of the federal judiciary responsible for community corrections, the Federal Probation and Pretrial Services System is fundamentally committed to providing protection to the public and assisting in the fair administration of justice.”).

341. See *supra* notes 1–7 and accompanying text.

342. See *United States v. Mistretta*, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting).

343. Cf. *Olmstead v. United States*, 277 U.S. 438, 469–70 (1928) (Holmes, J., dissenting) (arguing that the Fourth Amendment exclusionary rule is based on the notion that the judiciary no more than the prosecution can make use of illegally seized evidence) (“[N]o distinction can be taken between the Government as prosecutor and the Government as judge.”); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (same).

344. See PRESENTENCE INVESTIGATION REPORT, *supra* note 334, ch. II.

would hardly be described as neutral and detached.<sup>345</sup> As the U.S. Courts website candidly states, “U.S. probation and pretrial services officers are . . . federal law enforcement officers.”<sup>346</sup>

1. *The Presentence Investigation and Report*

Justice Breyer’s opinion for the Court in *Rita* described with evident satisfaction a typical, orderly Guidelines sentencing process:

Initially, a probation officer, with the help of the parties, and after investigating the background both of the offenses and of the offender, prepared a presentence report. The completed report describes “offense characteristics,” “offender characteristics,” and other matters that might be relevant to the sentence, and then calculates a Guidelines sentence.<sup>347</sup>

This sciolistic description is a fairy tale. Defendants do not voluntarily “help” probation officers compile the data that will be used against them. The very notion of a defendant collaborating in this process is incompatible with a justice system founded on a healthy mistrust of government. Defendants “help” probation officers because they are obliged.

Once convicted, whether by plea or trial, every defendant must submit to an interview by a probation officer. Courts require the interview even though no statute does, apparently as a vestige of the pre-Guidelines practice.<sup>348</sup> A defendant who pleads guilty but refuses to submit to the interview can be denied an acceptance-of-responsibility reduction.<sup>349</sup> Also, failure to provide complete

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345. *See, e.g.*, *Lo Ji Sales, Inc. v. New York*, 442 U.S. 319, 327 (1979) (“Once in the store, [the Town Justice] conducted a generalized search under authority of an invalid warrant; he was not acting as a judicial officer but as an adjunct law enforcement officer.”).

346. U.S. Courts, U.S. Probation and Pretrial Services System: Officers, <http://www.uscourts.gov/fedprob/system/officers.html> (last visited Apr. 3, 2010).

347. *Rita v. United States*, 551 U.S. 338, 342 (2007) (citation omitted).

348. Probation officers are required to investigate a defendant, *see* FED. R. CRIM. P. 32(c)(1), but no interview is required. In 1994, the rule was amended to provide defense counsel an opportunity to be present when there is an interview. *See id.* 32(c)(2).

349. *See, e.g.*, *United States v. Beal*, 960 F.2d 629, 632–33 (7th Cir. 1992) (holding that the defendant’s refusal to provide the probation officer a “full account of the circumstances surrounding his illegal possession [of a firearm]” was grounds for a denial of an acceptance-of-responsibility reduction even though the defendant admitted that the weapon was his); *see also* *United States v. Fonner*, 920 F.2d 1330, 1335 (7th Cir. 1990) (affirming a denial of an acceptance-of-responsibility reduction in part because the defendant “refused to cooperate with the probation office’s presentence investigation. ‘Flake off, Jack. Fuck you!’, were his words to the probation officer”); *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1433 (9th Cir. 1990) (“[T]he denial of a two-point reduction in the offense level for acceptance of responsibility for refusal to speak to a probation officer does not constitute a penalty for the exercise of a fifth amendment right.”); *United States v. Thompson*, 876 F.3d 1381, 1384–85 (8th

information may result in a two-level obstruction-of-justice enhancement.<sup>350</sup> These penalties are inflicted even though the Guidelines themselves recognize that in some cases the presentence investigation interview may implicate the Fifth Amendment.<sup>351</sup> Nonetheless, defendants are not given *Miranda* warnings prior to these interviews or advised that they need not participate—all because the probation officer is a “neutral” judicial employee.<sup>352</sup> Moreover, the courts of appeals unanimously ruled that the right to counsel does not apply during the presentence interview,<sup>353</sup> although

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Cir. 1989) (affirming a denial of an acceptance-of-responsibility reduction because “when [the defendant] was questioned by the probation officer, he simply answered ‘it’s a long story, I don’t want to talk about it’”). *But see* *State v. Cesnik*, 122 P.3d 456, 462 (Mont. 2005) (holding that the sentencing court violated the defendant’s right against self-incrimination by imposing a higher sentence in light of the defendant’s refusal to admit guilt and accept responsibility).

350. *See, e.g.*, *United States v. Anderson*, 68 F.3d 1050, 1055–56 (8th Cir. 1995) (upholding a sentencing enhancement for obstruction of justice because the defendant refused to provide certain financial information to a probation officer); *United States v. Nelson*, 54 F.3d 1540, 1543–44 (10th Cir. 1995) (upholding a sentencing enhancement for obstruction of justice because the defendant told a probation officer he had no bank account when in fact he did); *United States v. Smaw*, 993 F.2d 902, 903–05 (D.C. Cir. 1993) (upholding a sentencing enhancement for obstruction of justice and a denial of an acceptance-of-responsibility reduction because the defendant failed to disclose her ownership interest in property in which she had no equity); *United States v. Ford*, 989 F.2d 347, 352–53 (9th Cir. 1993) (holding that defendant’s failure to turn over business records did not warrant an obstruction-of-justice enhancement but precluded the application of an acceptance-of-responsibility reduction); *United States v. Saenz*, 915 F.2d 1046, 1047 (6th Cir. 1990) (upholding enhancement for obstruction of justice because the defendant misrepresented the source of his cocaine and failed to disclose his receipt of payment for drugs).

351. The application notes to the enhancement for obstruction of justice provide:

This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant’s denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision.

U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.2 (2009).

352. *See United States v. Rogers*, 921 F.2d 975, 979 (10th Cir. 1990) (“The purpose of the presentence report, including associated interviews, is neither prosecutorial nor punitive. It is essentially neutral in those respects. The probation officer acts as an agent of the court . . .”); *United States v. Jackson*, 886 F.2d 838, 842 n.4 (7th Cir. 1989) (“[W]e do not believe that a federal probation officer acts on behalf of the prosecution.”). These decisions ignore that the probation officer is, of course, a government agent, regardless of which branch employs him, and is therefore restrained by the Constitution in the same way any government agent is. *See generally* *Miranda v. Arizona*, 384 U.S. 436, 467–70 (1966).

353. *See, e.g.*, *United States v. Gordon*, 4 F.3d 1567, 1572 (10th Cir. 1993) (“Because the probation officer does not act on behalf of the government, we join those circuits that have concluded that the presentence interview is not a

some courts have invoked supervisory authority to allow counsel to be present.<sup>354</sup> Even after the Federal Rules of Criminal Procedure were amended in 1994 to require that defense attorneys be allowed to attend presentence interviews,<sup>355</sup> federal appellate courts continued to hold that their presence was not constitutionally required.<sup>356</sup>

The federal circuit courts' unanimous refrain that, because probation officers are neutral judicial employees, their interviewing defendants does not raise any constitutional concern proceeds from a single authority—the 1949 case of *Williams v. New York*.<sup>357</sup> Putting aside the fact that it predated the Guidelines by nearly forty years, the case raised no issue regarding a probation officer's role in federal sentencing. Rather, the issue in *Williams* was whether the sentencing judge's reliance on "additional information obtained through the court's 'Probation Department, and through other sources'" violated the defendant's right of confrontation.<sup>358</sup> It had nothing whatsoever to say about separation-of-powers concerns—a critical fact which the courts of appeals brushed aside.<sup>359</sup> Nor could it possibly have, given that the case was on appeal from a New York state-court verdict and nothing in the federal Constitution allows the Supreme Court to rule on state separation-of-powers issues.<sup>360</sup>

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critical stage of the proceeding within the meaning of the Sixth Amendment."); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992) ("Although the Sentencing Guidelines have increased the importance of the probation officer's report, in non-capital cases such as this one the presentence interview does not represent a 'critical stage of the prosecution.'"); *United States v. Johnson*, 935 F.2d 47, 50 (4th Cir. 1991) ("[A] presentence interview is not a critical stage because a probation officer does not have an adversarial role during a presentence interview with a defendant."); *United States v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990) ("[A] routine presentence interview (at least in non-capital cases) is 'not a critical stage of the proceedings in which counsel's presence or advice is necessary to protect the defendant's right to a fair trial.'" (quoting *Brown v. Butler*, 811 F.2d 938, 941 (5th Cir. 1987))).

354. See, e.g., *Tisdale*, 952 F.2d at 940; *Herrera-Figueroa*, 918 F.2d at 1434 (exercising the court's supervisory powers in order to require probation officers to permit defense attorneys to attend interviews but refusing to rule that the presence of counsel was guaranteed by Sixth Amendment).

355. See FED. R. CRIM. P. 32(c)(2) (1994).

356. See, e.g., *United States v. Byers*, 100 F. App'x 139, 142 (4th Cir. 2004) (holding that "because a probation officer is not an agent of the prosecution, [the defendant] had no Sixth Amendment right to counsel during the presentence interview").

357. 337 U.S. 241 (1949); see, e.g., *United States v. Washington*, 146 F.3d 219, 223 (4th Cir. 1998); *Woods*, 907 F.2d at 1543–44; *United States v. Belgard*, 894 F.2d 1092, 1096–98 (9th Cir. 1990).

358. *Williams*, 337 U.S. at 242.

359. See, e.g., *Belgard*, 894 F.2d at 1096–97 ("While we have no indication that the Court was asked to pass upon the separation of powers issue, [*Williams*] could hardly be a more clear repudiation of the notion that probation officers cannot properly function within the judicial branch of government.").

360. See *Printz v. United States*, 521 U.S. 898, 908 n.2 (1997) (noting that

Finally, *Williams* was decided firmly within the context of a rehabilitative theory of punishment and extolled the type of indeterminate-sentencing scheme that the Guidelines supplanted.<sup>361</sup> Justice Black's rationale for holding that sentencing judges could rely on information not presented in open court without violating the Fourteenth Amendment's Due Process Clause<sup>362</sup> expressly depended on the fact that the probation officers of the 1940s generally *helped* defendants:

[A] strong motivating force for [sentencing] changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified.

Under the practice of individualizing punishments, investigational techniques have been given an important role. *Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders.* Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information.<sup>363</sup>

*Williams* not only provides no support for excluding defense

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the line between the executive and judicial branches of a state government "is not necessarily identical with the line established by the Constitution for federal separation-of-powers purposes"); *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) ("[T]his Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments."); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State."); *see also Colorado Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting) (denial of cert.) ("Generally the separation of powers among branches of a State's government raises no federal constitutional questions, subject to the requirement that the government be republican in character.").

361. *Williams*, 337 U.S. at 248 ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." (footnote call number omitted)).

362. *See id.* at 250–52.

363. *Id.* at 249 (emphasis added). Heralding Justice Scalia, Justice Murphy dissented in *Williams*, arguing that the "judge, even though vested with statutory authority to do so, should hesitate indeed" to impose a death sentence when "[t]he jury which heard the trial unanimously recommended life imprisonment as a suitable punishment for the defendant." *Id.* at 252–53 (Murphy, J., dissenting); *see also United States v. Wise*, 976 F.2d 393, 409–10 (8th Cir. 1992) (en banc) (Arnold, C.J., dissenting) (arguing that *Williams* is "obsolete" and that the Confrontation Clause should apply at sentencing).

counsel from interviews with today's federal probation officers, it stands as an utter repudiation of today's retributive, inquisitorial federal sentencing regime.<sup>364</sup>

Today's federal presentence interview may appear similar to what Justice Black wrote about in 1949, but its purpose is not to ascertain the defendant's particular circumstances. It is to ensure that he is treated exactly the same as every similar convict. This is an analytically significant difference from the context in which *Williams* was decided:

In the past, it was possible to maintain at least the charade that the government, at sentencing, was no longer a pure adversary to the defendant. In a sentencing system based in part on rehabilitative principles, once the defendant was convicted of the crime charged, the government—and the trial judge—could be viewed (at least in theory) as acting in the best interests of the defendant. Under a retributive guideline system, however, there is no mistaking the obvious fact that the government and the defendant remain adversarial throughout the sentencing stage of the proceedings.<sup>365</sup>

The probation officer typically begins by introducing herself to the defendant as a “neutral” officer of the court whom the defendant need not distrust.<sup>366</sup> This claim, however, is belied by the fact that “an uncounseled defendant's responses [in a presentence investigation interview]—erroneous or not—can ultimately result in an increased sentence.”<sup>367</sup> Probation officers ask defendants for a detailed family history and to characterize the quality of their relationships with parents, siblings, spouses, and children.<sup>368</sup> Defendants must also extensively describe their education, military service, employment history, and medical history, stretching back many years even though this information almost never has any bearing on the case or the sentence, as the Guidelines themselves make clear.<sup>369</sup> Defendants must disclose all assets and liabilities so that the court can determine their ability to pay a fine or

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364. *But see Belgard*, 894 F.2d at 1097 (“[A]lthough the Supreme Court was specifically addressing a different sentencing model when it decided *Williams*, virtually everything it said then remains true under the Guideline system, and there is no reason to believe its opinion would change.”).

365. Joseph L. Hoffman, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 267 (2001) (footnote call number omitted).

366. PRESENTENCE INVESTIGATION REPORT, *supra* note 334.

367. *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1436 (9th Cir. 1990); *see also* FED. R. CRIM. P. 32(c)(2) (amended in 1994 to provide that a probation officer must provide defense counsel notice and reasonable opportunity to attend the presentence interview).

368. *See* PRESENTENCE INVESTIGATION REPORT, *supra* note 34034, at II-3-II-13 (suggesting personal questions to ask).

369. *See infra* note 379.



restitution.<sup>370</sup> To verify the background information, defendants are asked to sign forms consenting to disclosure of their credit reports; medical, military, and education records; and tax returns.<sup>371</sup> The probation officer may also contact employers, schools, or the military and conduct a home visit.<sup>372</sup>

In *Rita*, Justice Breyer artfully described this biographical litany as information that “might be relevant to the sentence.”<sup>373</sup> All of this background information, however, is declared “ordinarily not relevant” by the Guidelines.<sup>374</sup> Thus, it is extremely unlikely that the interview will uncover a basis for mitigation that the defendant’s lawyer missed. The lengthy interviews are simply fishing expeditions meant to gather information that will enhance the Guidelines sentence. The interview is therefore quintessentially inquisitorial: “The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.”<sup>375</sup>

The only justification (beyond empty rhetoric<sup>376</sup>) for the interview is to force each defendant to provide information that might serve to increase his sentence or compromise him in other ways.<sup>377</sup> If the probation officer believes the defendant

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370. See, e.g., *United States v. Anderson*, 68 F.3d 1050, 1055–56 (8th Cir. 1995) (upholding a sentencing enhancement for obstruction of justice because the defendant refused to provide certain financial information to a probation officer).

371. See PRESENTENCE INVESTIGATION REPORT, *supra* note 334, at II-21.

372. See, e.g., *United States v. Burgos*, 276 F.3d 1284, 1286 (11th Cir. 2001).

373. *Rita v. United States*, 551 U.S. 338, 342 (2007).

374. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2009) (age not ordinarily relevant), 5H1.2 (education and vocational skills not ordinarily relevant); *id.* § 5H1.3 (mental and emotional conditions not ordinarily relevant); *id.* § 5H1.4 (physical condition, appearance, drug or alcohol dependence not ordinarily relevant); *id.* § 5H1.5 (employment not ordinarily relevant); *id.* § 5H1.6 (family ties and responsibilities not ordinarily relevant); *id.* § 5H1.11 (military service, civic work, charity work, other good deeds not ordinarily relevant); *id.* § 5H1.12 (disadvantaged upbringing, lack of guidance not ordinarily relevant).

Justice Breyer is of course well aware that the Guidelines disregard personal characteristics. See Breyer, *supra* note 76, at 19–20 (“[T]he current offender characteristic rules look primarily to past records of convictions.”). In *Rita*, Justice Breyer refused to address the defendant’s claim that these Guidelines “policy statements” violated his statutory right under 18 U.S.C. § 3553(a) to have the court consider his personal characteristics. *Rita*, 551 U.S. at 348, 360. Considering that claim would have risked seriously undermining sentencing uniformity.

375. *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

376. See, e.g., *United States v. Belgard*, 894 F.2d 1092, 1097 (9th Cir. 1990) (“[T]he presentence report is not tied to the rehabilitative model; there is no inextricable link between the two notions. A court needs as much detailed information if it seeks to impose a uniform sentence as it needs if it seeks to rehabilitate directly. The idea that the punishment should fit the crime does not preclude its also fitting the criminal.”).

377. *But see id.* at 1098 (“While probation officers will now have to total up

misrepresented something during the interview, the sentence may be enhanced for obstruction of justice.<sup>378</sup> The interview may also compromise a defendant in unforeseeable ways. In one case, a federal judge turned over a defendant's supposedly confidential presentence investigation report from a federal Medicare-fraud case to Florida state prosecutors.<sup>379</sup> The state used it to undercut the defendant's diminished-capacity defense to an unrelated murder charge.<sup>380</sup>

The Probation Office, moreover, routinely shares information obtained through these interviews with the Department of Justice. In 2000, for example, federal probation offices began sharing defendants' tax returns and other financial records with the United States Attorney's Offices and taking other action to assist in the collection of fines.<sup>381</sup> Since 2001, probation officers have collected DNA samples—using force if necessary—from offenders under their supervision for inclusion in a Federal Bureau of Investigation database.<sup>382</sup> Even before Congress appropriated funding for DNA collection, the Director of the Administrative Office of the United States Courts decided that “probation offices should begin collecting blood samples as soon as possible,” adding that any supervisee's failure to comply “should be reported promptly to the court.”<sup>383</sup> The courts of appeals have rejected separation-of-powers challenges to having probation officers collect DNA—even though “it does serve a law enforcement purpose because the DNA samples are turned over to the FBI for use in solving crimes”<sup>384</sup>—reasoning that the delegation does not encroach on any executive branch function.<sup>385</sup> Whether or not having judicial employees collect DNA violates the separation-of-powers doctrine, it certainly refutes the bromide that probation officers are “neutral” and not adverse to the defendant; the sole purpose of the search is to uncover further incriminating

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points based upon the facts they develop, that is far from prosecution. Points may be added or subtracted.”)

378. *See supra* note 350.

379. *United States v. Gomez*, 323 F.3d 1305, 1307 (11th Cir. 2003) (affirming the federal district judge's disclosure of the PSI and holding that the State's need to impeach defendant's defense was compelling).

380. *Id.* at 1306–07, 1309.

381. *See* FED. CORRS. & SUPERVISION DIV., ADMIN. OFFICE OF THE U.S. COURTS, MONOGRAPH NO. 114, CRIMINAL MONETARY PENALTIES: A GUIDE TO THE PROBATION OFFICER'S ROLE (2000). This monograph sets forth in considerable details the steps that probation officers should take to ascertain a defendant's ability to pay various monetary penalties and to collect those penalties.

382. *See* 42 U.S.C. § 14135a(a)(2) & (4) (2006).

383. Memorandum from John M. Hughes, Assistant Dir., Admin. Office of the U.S. Courts, to All Chief Probation Officers 1, 3 (December 14, 2001) (on file with author).

384. *United States v. Sczubelek*, 402 F.3d 175, 188 (3d Cir. 2005).

385. *See, e.g., United States v. Lujan*, 504 F.3d 1003, 1007 (9th Cir. 2007); *United States v. Hook*, 471 F.3d 766, 776–77 (7th Cir. 2006); *Sczubelek*, 402 F.3d at 188.

information about the defendant—something neutral courts, by definition, do not do.

After *Booker*, it may technically be true that judges can, just as they did before the Guidelines, consider all of this information.<sup>386</sup> Sentencing statistics indicate, however, that judges continue after *Booker* to disregard this information.<sup>387</sup> Moreover, even if judges accustomed to leaving sentencing to the Guidelines matrix were to begin considering each defendant's personal circumstances, that would not obviate the objectionable inquisitorial aspects of the presentence investigation. Before the Guidelines, the defendant could choose whether to cooperate with the probation officer's investigation because it was undertaken, ostensibly at least, to benefit the defendant. In the present-day determinate-sentencing regime, the presentence investigation is mandatory and is far more likely to hurt the defendant at sentencing than to help him.

## 2. *The Guidelines Calculation*

In addition to investigating the defendant, probation officers are expected to calculate the applicable Guidelines range.<sup>388</sup> This requires the probation officer to describe the "offense characteristics," a duty they typically dispatch by reciting all of the government's initial allegations,<sup>389</sup> including those relating to counts dismissed pursuant to a plea agreement or counts of which the defendant was acquitted at trial. This is because the Guidelines allow courts to consider as "relevant conduct" acts that were not proven and even acts of which the defendant was acquitted.<sup>390</sup> (*Booker*, of course, would have changed this had the remedial majority not instead made the Guidelines merely advisory.<sup>391</sup>) A probation officer's mere repetition of law-enforcement officers' allegations can suffice to prove the "facts" of the case.<sup>392</sup> This

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386. In his concurring opinion in *Rita*, Justice Stevens noted that "§ 3553(a) authorizes the sentencing judge to consider" such factors despite the Guidelines. *Rita v. United States*, 551 U.S. 338, 365 (2007) (Stevens, J., concurring).

387. See FINAL REPORT ON THE IMPACT OF *BOOKER*, *supra* note 235, at 46–47.

388. See FED. R. CRIM. P. 32(d)(1).

389. STITH & CABRANES, *supra* note 9, at 138–39; Jack H. McCall, Jr., *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 502–03 (1993).

390. See *United States v. Watts*, 519 U.S. 148, 152–57 (1997) (per curiam); *United States v. Jimenez*, 513 F.3d 62, 88 (3d Cir. 2008); *United States v. Faust*, 456 F.3d 1342, 1347–48 (11th Cir. 2006); see also 18 U.S.C. § 3661 (2006) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2009).

391. See *supra* notes 219–20 and accompanying text.

392. See, e.g., *United States v. Wise* 976 F.2d 393, 404 (8th Cir. 1992) (en banc) (holding that a probation officer's testimony that he obtained information in the defendant's presentence investigation report from "the Secret Service and

reliance on law-enforcement allegations not subject to meaningful cross-examination persists even after *Booker*.<sup>393</sup>

Relying again on *Williams v. New York*,<sup>394</sup> the courts of appeals have unanimously concluded that the Confrontation Clause does not prevent Guidelines sentencing enhancements based exclusively on multiple hearsay.<sup>395</sup> As two circuit judges have argued in dissents, *Williams*' rationale has no application to the Guidelines' regime—both because it was decided under the Fourteenth Amendment Due Process Clause and because it presupposed a rehabilitative system

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the personnel in the prosecutor's office" gives the report "an aura of authenticity that renders it sufficiently reliable as the basis of a finding of fact"); *United States v. Aymelek*, 926 F.2d 64, 68 (1st Cir. 1991) (holding that a detention officer's affidavit was sufficiently reliable to support a sentencing enhancement); *United States v. Kikumura*, 918 F.2d 1084, 1102–04 (3d Cir. 1990) (affirming reliance at sentencing on an FBI agent's affidavit relating a confidential informant's testimony regarding the defendant's presence at a terrorist training camp); *United States v. Burns*, 894 F.2d 334, 336–37 (9th Cir. 1990) (recognizing that hearsay statements in a Secret Service report were sufficiently reliable to support a higher loss amount at sentencing); *United States v. Cuellar-Flores*, 891 F.2d 92, 93 (5th Cir. 1989) (holding that a probation officer's statement that the defendant committed the offense for profit was sufficiently reliable to support a sentencing enhancement because the probation officer "received his information from a law-enforcement officer" and "is himself an officer who is well known to the court and who had no motive to distort or misrepresent the facts").

393. *See, e.g.*, *United States v. Docampo*, 573 F.3d 1091, 1098–99 (11th Cir. 2009) (holding that an agent's testimony (based on hearsay) that defendant made threats to a cooperating witness' girlfriend was sufficiently reliable to support a sentencing enhancement); *United States v. Pratt*, 553 F.3d 1165, 1170–71 (8th Cir. 2009) (holding that a police officer's testimony as to hearsay statements of alleged co-conspirators was "sufficiently reliable" to support an enhanced sentence); *United States v. House*, 551 F.3d 694, 700 (7th Cir. 2008) (holding that an FBI agent's testimony (based on hearsay) that defendant asked an intermediary to ask a witness not to testify was sufficiently reliable to support a sentencing enhancement even though it was [not] "the strongest case the government could have put on"); *United States v. Cook*, 550 F.3d 1292, 1297 (10th Cir. 2008) (holding that hearsay statements in the police officer's affidavit and report were sufficiently reliable to support a sentencing enhancement).

394. 337 U.S. 241 (1949).

395. *See, e.g.*, *United States v. Littlesun*, 444 F.3d 1196, 1200 (9th Cir. 2006) (holding that, under *Williams*, the right of confrontation at sentencing is grounded in the Due Process Clause rather than the Confrontation Clause and that reliable hearsay can be sufficient evidence for an enhancement); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005) (same); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005) (same); *United States v. Silverman*, 976 F.2d 1502, 1514 (6th Cir. 1992) (same); *United States v. Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992) (same); *Kikumura*, 918 F.2d at 1099–1100, 1102–03 (same); *United States v. Byrd*, 898 F.2d 450, 453 (5th Cir. 1990) (same); *United States v. Beulieu*, 893 F.2d 1177, 1181 (10th Cir. 1990) (same); *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989) (same). One case in the Fourth Circuit suggests that this remains an open question. *See United States v. Higgs*, 353 F.3d 281, 324 (4th Cir. 2003). However, there seems to be conflict within the circuit. *See, e.g.*, *United States v. Newbold*, 215 F. App'x 289, 299 (4th Cir. 2007).

of criminal justice.<sup>396</sup> *Williams* held that the State of New York's sentencing procedure did not violate the defendant's right to substantive due process because in 1949 the Sixth Amendment Confrontation Clause had not yet been held applicable to state-court proceedings.<sup>397</sup> Contrary to the prevailing view in the federal appellate courts, *Williams* did not address—even indirectly—whether the “criminal prosecutions” regulated by the Sixth Amendment comprise sentencing determinations. The case's holding, therefore, has no application whatsoever to federal criminal cases.<sup>398</sup> Furthermore, *Williams* was not interpreted—even before the enactment of the Guidelines—to authorize increased sentences based on unsubstantiated hearsay that the defendant committed uncharged offenses.<sup>399</sup>

Moreover, the courts of appeals are in error in continuing to analyze the use of hearsay at sentencing under a substantive due process rubric when the Confrontation Clause of the Sixth Amendment would seem to apply directly.<sup>400</sup> If the phrase “criminal prosecutions” encompasses sentencing determinations, then the Confrontation Clause applies at sentencing and guarantees the right to cross-examine any testimonial witnesses.<sup>401</sup> There is every reason

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396. See *United States v. Fields*, 483 F.3d 313, 364–67 (5th Cir. 2007) (Benavides, J., dissenting) (arguing that the Confrontation Clause applies at capital sentencing and that, where facts found at sentencing increase the defendant's exposure, “the Confrontation Clause should apply and *Williams* does not control even in the non-capital context”); *Wise*, 976 F.2d at 406–10 (Arnold, C.J., concurring in part and dissenting in part) (arguing that the Confrontation Clause should apply at sentencing).

397. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (incorporating the Confrontation Clause through the Fourteenth Amendment).

398. See Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1890–91 (1992) (criticizing the courts of appeals' reliance on *Williams* and arguing that the Confrontation Clause should apply to federal Guidelines sentencing).

399. See, e.g., *United States v. Weston*, 448 F.2d 626, 633–34 (9th Cir. 1971) (vacating a sentence that had been increased by fifteen years based on “the opinion of unidentified personnel in the Bureau of Narcotics and Dangerous Drugs, and the unsworn statement of one agent that an informer had given him some information lending partial support to the charge”); see also *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (holding that a sentence based on materially untrue information violates due process).

400. Where a specific amendment “provides an explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing [the] claim[.]” *Graham v. Connor*, 490 U.S. 386, 395 (1989); see also *Portuondo v. Agard*, 529 U.S. 61, 74 (2000) (analyzing the defendant's claim under the Fifth and Sixth Amendments and therefore refusing to engage in a separate Fourteenth Amendment due-process analysis).

401. *Fields*, 483 F.3d at 369 (Benavides, J., dissenting); *Wise*, 976 F.2d at 407 (Arnold, C.J., dissenting); cf. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532, 2542 (2009) (holding that affidavits regarding the type and amount of illegal drugs involved in an offense constituted testimonial statements and thus could not be admitted at trial without cross-examination of the declarant).

to believe that it does. First, the plain language of the Sixth Amendment distinguishes between rights that apply only at trial (a speedy and public trial by an impartial, locally-drawn jury, and notice of the charges) and those that apply throughout “all criminal prosecutions” (confrontation of witnesses, compulsory process, and counsel).<sup>402</sup> This suggests that trial is only one part of a criminal prosecution; sentencing would presumably be another.<sup>403</sup> The Supreme Court recently affirmed that a criminal prosecution begins, for right-to-counsel purposes, at initial appearance, which “signals a sufficient commitment to prosecute and marks the start of adversary judicial proceedings.”<sup>404</sup> Certainly, sentencing under the Guidelines is likewise part of adversary judicial proceedings. Earlier high-court cases holding that a criminal case ends with the imposition of sentence (or a suspended sentence) confirm that supposition.<sup>405</sup> Second, the purpose of the Confrontation Clause—to subject statements made to government agents “to establish or prove past events potentially relevant to later criminal prosecution” to cross-examination<sup>406</sup>—is served by applying the clause at sentencing.<sup>407</sup>

Once the offense is described, it remains for the probation officer to determine the base offense level and the applicability of any reductions or enhancements.<sup>408</sup> Far from being a mechanical, arithmetical process, this requires probation officers to interpret statutes, Guidelines, and precedent. Although they are not trained or licensed as lawyers, probation officers take positions on the meaning and application of Guidelines provisions and make legal arguments, citing and interpreting case law to support those positions. Many Guidelines provisions can be challenging for even trained lawyers and judges to apply. Even determining the base offense level often presents intricate mixed questions of law and fact. In a conspiracy case, for example, the base offense level depends on what was reasonably foreseeable to each defendant. In a fraud or theft case, the amount of loss attributable to the defendant is often sharply contested. Drug cases turn on the amount of drugs each defendant is responsible for distributing. Questions over the

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402. See U.S. CONST. amend. VI.

403. See *United States v. Ray*, 578 F.3d 184, 195–99 (2d Cir. 2009) (holding that the Speedy Trial Clause does not apply at sentencing because sentencing constitutes a “separate and distinct phase[] of [a] criminal prosecution[]”).

404. *Rothgery v. Gillespie County, Texas*, 128 S.Ct. 2578, 2590 (2008).

405. See *Korematsu v. United States*, 319 U.S. 432, 434 (1943) (collecting cases). Justice Thomas’s dissent in *Rothgery* suggests that the Founders would have understood “criminal prosecutions” to extend through final judgment, thus including sentencing. See *Rothgery*, 128 S.Ct. at 2597.

406. *Davis v. Washington*, 547 U.S. 813, 822 (2006). See generally *Crawford v. Washington*, 541 U.S. 36, 50–57 (2004) (discussing the historical concerns underpinning the Confrontation Clause).

407. See *Blakely v. Washington*, 542 U.S. 296, 309 (2004).

408. See FED. R. CRIM. P. 32(d)(1).

applicability of adjustments to the base offense level introduce additional legal and factual complications.

Typically, the probation officer's calculations assume that all of the government's allegations are true and seek to impose the highest sentence those allegations will bear. There are many reported cases, in fact, in which the probation officer computes a higher sentence than the prosecutor.<sup>409</sup> Enshrining the government's version of events ahead of the hearing in a purportedly neutral document effectively reverses the burden of proof by forcing the defendant to object to "facts" yet to be established with any evidence. Case law suggests that judges in fact do *not* understand that the presentence investigation report has no evidentiary significance and routinely accord its assertions a presumption of validity.<sup>410</sup> The significance of the parties' input and of the sentencing hearing itself is diminished in favor of a bureaucrat's inquisitorial report.

### 3. *The Recommended Sentence*

Nor is the probation officer's role limited to providing an initial Guidelines calculation for the parties to debate. The probation officer advocates for a particular outcome. After the prosecution and the defense have made their objections to the findings and calculations in the presentence investigation report, probation officers are directed to draft an addendum that "provides a synopsis of the unresolved objections by counsel *and the officer's position as to each objection.*"<sup>411</sup> Probation officers are instructed to defend their factual findings and to reference Guidelines provisions in support of their Guidelines calculations in the addendum.<sup>412</sup> Officers are affirmatively encouraged to make legal arguments: "Depending on the court, officers may cite case law to support their position."<sup>413</sup> This is so even though probation officers typically lack any legal training and often understand neither the Guidelines nor the

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409. *See, e.g.*, United States v. Buchan, 580 F.3d 66, 70 (1st Cir. 2009); United States v. Woods, 907 F.2d 1540, 1543–44 (5th Cir. 1990) ("In his case, [the defendant] maintains, the probation officer was more prosecutorial than the prosecutor—while the prosecutor stipulated that only 440 grams of amphetamine were involved in the conspiracy, the probation officer recommended that the court disregard that stipulation and base [the defendant's] sentence upon a larger quantity of drugs.").

410. *See, e.g.*, United States v. Wise, 976 F.2d 393, 404 (8th Cir. 1992) (en banc) (crediting probation officer's hearsay testimony regarding defendant's status as an organizer or leader because there was "nothing in the record before us to indicate that the probation officer had any reason to lie or to distort or misrepresent the facts").

411. *See* PRESENTENCE INVESTIGATION REPORT, *supra* note 334, at IV-3 (emphasis added).

412. *See id.*

413. *Id.*

relevant case law.<sup>414</sup>

Federal courts nonetheless accept probation officers' routine practice of presenting factual and legal arguments on the incongruous supposition that the probation officers' arguments, unlike those of the parties, are somehow "objective."<sup>415</sup> One district judge, sitting by designation on the Sixth Circuit, wrote in response to a defendant's objection to the probation officer's advocating against a downward departure: "When the recommendation is based fairly on the facts and dispassionately traces its way through the law to a sensible conclusion, the requirement of neutrality has been met."<sup>416</sup> But *all* effective legal advocacy is meant to appear to be "based fairly on the facts" and to "dispassionately" suggest "a sensible conclusion." That is precisely what lawyers do. As Justice Holmes famously explained, there is no "objective" legal reasoning in the common-law system.<sup>417</sup> This is especially true in the Guidelines-application context, which often requires considering the interplay among constitutional rights, statutes, the Guidelines, and conflicting analogous precedent. Even if some objectively correct sentence existed in every case, the judge and her law clerks, who are all trained lawyers, would be in a better position to discover it than the probation officer. To that end, the judge would be better off relying on the usual mode of adversarial litigation, through which the parties present their competing interpretations of the pertinent authorities.

Worse yet, probation officers have secret, *ex parte* communications with sentencing judges in derogation of adversarial procedural norms.<sup>418</sup> Immediately before the sentencing hearing,

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414. See STITH & CABRANES, *supra* note 9, at 86 (stating that probation officers are typically trained as social workers).

415. See, e.g., *United States v. Espalin*, 350 F.3d 488, 496 (6th Cir. 2003) (Lawson, D.J., concurring) ("A sentencing court is best served by objective, accurate information from the probation officer. That information will likely be detrimental to the position of one side or the other, or might even contravene the parties' stipulations.").

416. *Id.*

417. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1896) ("Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."); see also *Gompers v. United States*, 233 U.S. 604, 610 (1914) ("[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil.") (Holmes, J.).

418. See, e.g., *United States v. Johnson*, 935 F.2d 47, 50–51 (4th Cir. 1991) ("We hold that an *ex parte* presentence conference between a court and a probation officer is not a critical stage of the sentencing proceedings."). *But cf.* *Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."); *In re Paradyne Corp.*, 803 F.2d 604, 608 (11th Cir. 1986) (holding that a judge's



the probation officer recommends a particular sentence to the judge. This recommendation sheet is not part of the report and is not disclosed to the parties or made part of the record.<sup>419</sup> The judge may even meet privately with the probation officer to discuss the recommendations. These conversations are also not part of the record. Appellate courts approve them on the nonsensical ground that they are “nonadversarial communications.”<sup>420</sup> Needless to say, these secret chats can have a tremendous impact on the ultimate sentence, depending on the judge and the circumstances. In one telling case, Judge Susan Dlott of the Southern District of Ohio realized she had imposed a high sentence only because of baseless comments that the probation officer and a pretrial services officer had made in chambers.<sup>421</sup> They told the judge that they personally believed the defendant had engaged in acts of child molestation—even though there was no evidence whatsoever of that. Months after imposing the sentence, Judge Dlott called counsel into chambers and said:

What happened was I had been contacted, I think, by both Probation and Pretrial about this case. And I coincidentally had a meeting with both of them at the same time. And it was during that meeting that these officers expressed opinions to me that were contrary to what was in the presentence report. And instead of giving the parties an opportunity to address that—or what I should have done was not considered that, because it wasn’t part of the presentence report and it was counter to what counsel thought I was using as a basis for my sentencing. I mean, counsel thought I was sentencing on the basis that he had never acted on his pedophilia, when, in fact, I was influenced by hearsay to the contrary.

I apologize for this. My only explanation was I sentenced 28 people in that week, and I was just trying to get ready for a long surgery and a long period out of the office. And I didn’t give this the time and thought that I should have.<sup>422</sup>

In light of the judge’s candor, the Sixth Circuit reversed and

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intent to conduct ex parte interviews of defendants and counsel to ensure a knowing waiver of alleged conflict of interest “is so clearly at odds with the principles of the open, adversarial system of justice guaranteed by our Constitution” as to “endanger the defendants’ rights”).

419. See, e.g., FED. R. CRIM. P. 32(e)(3) (“By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer’s recommendation on the sentence.”); *Johnson*, 935 F.2d at 51 (“[A] probation officer’s final sentence recommendation, diagnostic opinions, and confidential or sensitive information need not be disclosed.”).

420. See, e.g., *Johnson*, 935 F.2d at 50 (“During these nonadversarial communications, the court confers with its own agent in the absence of the defendant or any representative of the prosecution.”).

421. See *United States v. Christman*, 509 F.3d 299, 303–04 (6th Cir. 2007).

422. *Id.* at 303.

remanded for resentencing.<sup>423</sup> But this outcome was hardly a forgone conclusion given the view that some federal judges regard probation officers as having some unexplained superior insight into sentencing that merits deference without adversarial testing. Indeed, Chief Judge Danny Boggs dissented from the reversal: "A judge is not barred from discussing a presentence report with probation or pretrial court employees, any more than with a judge's own law clerks."<sup>424</sup> A sentence based in part on a law clerk's unfounded, speculative, secret hunch about a defendant would very likely violate due process.<sup>425</sup> Nonetheless, sentences based on ex parte communications with probation officers are affirmed on the implicit assumption that a probation officer's *ipse dixit* constitutes reliable evidence.<sup>426</sup>

But for Judge Dlott's own initiative and humility, the probation officer's improper statements would never have come to light. Many judges no doubt would not even have realized the exchange was inappropriate or, if they did, would have been loath to confess the impropriety. Like Chief Judge Boggs, these judges would perceive no problem with a judge being influenced to impose a harsh sentence by ex parte "communications with members of the court family (clerks and pretrial and probation officers)."<sup>427</sup> Obviously, there is no way to know how many sentences have been influenced by similarly improper, unsubstantiated, ex parte comments.<sup>428</sup> But the ex parte contact between probation officers and judges provides ample opportunity. Federal courts justify these ex parte conversations regarding the applicability of legal rules governing sentencing by citing to pre-Guidelines cases, which makes as little sense as relying on *Williams* as authority for excluding defense

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423. *See id.* at 312.

424. *Id.* at 312–13 (Boggs, C.J., dissenting). *But see* *United States v. Spudic*, 795 F.2d 1334, 1343–44 (7th Cir. 1986) (holding that the judge could not confer with a group of probation officers serving as "sentencing council" to discuss what a fair sentence would be) ("There could be legitimate concern . . . that one of the probation officers . . . may have contributed some additional pertinent adverse information about the defendant.").

425. *See* *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948).

426. *See, e.g.,* *United States v. Fraza*, 106 F.3d 1050, 1055–56 (1st Cir. 1997) (affirming the denial of unopposed minor-role downward adjustment based on an ex parte conversation between the judge and a probation officer during the sentencing hearing).

427. *Christman*, 509 F.3d at 313 (Boggs, C.J., dissenting).

428. *See* *United States v. Johnson*, 935 F.2d 47, 49–52 (4th Cir. 1991) (holding that, because the probation officer is "a neutral, information-gathering agent of the court, not an agent of the prosecution," ex parte communications between the court and probation officer do not implicate the Sixth Amendment right to confrontation); *United States v. Belgard*, 894 F.2d 1092, 1099 n.7 (9th Cir. 1990) (stating that "ex parte communications of the probation officer with the court are proper" (citing *United States v. Gonzales*, 765 F.2d 1393, 1398–99 (9th Cir. 1985))).

counsel from presentence interviews.<sup>429</sup>

#### V. RESTORING ADVERSARIAL SENTENCING

In the post-*Booker* era, the advisory Guidelines continue to exert tremendous pressure upon defendants to confess and incriminate others, and they continue to subordinate the parties to a probation-officer-*cum*-inquisitor. While Professor Stith praised the *Booker* remedial decision for “addressing and reducing the prosecutor’s power over sentencing in every case” by recharging and reinvigorating judicial discretion,<sup>430</sup> the important question is not whether judges have discretion at sentencing. There is no doubt that it would be constitutional for Congress to fix the sentence for every crime and allow *no* judicial discretion. But, as Justices Stevens, Scalia, and Souter have long insisted, the Sixth Amendment does not allow for a defendant’s culpability to be determined inquisitorially rather than adversarially. The *Booker* remedial majority rescued the Guidelines’ inquisitorial sentencing process by claiming that any procedure in which the prosecution and defense participate in some way is adversarial enough.<sup>431</sup> Their gamble that the Guidelines would become advisory in name only has paid off.

Subsequently, *Rita* left no doubt that Justice Breyer is determined to entrench administrative, inquisitorial sentencing. His description of a “normal” sentencing procedure in his opinion for the Court<sup>432</sup> fails to grasp or contend with the fact that the presentence investigation report—and not the Guidelines—is the central problem with the Guidelines system:

The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply . . . . Thus, the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure.<sup>433</sup>

The *Rita* majority failed to appreciate that relegating the

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429. See *Johnson*, 935 F.2d at 49 (citing pre-Guidelines cases rejecting constitutional challenges to ex parte conversations between judges and probation officers and stating that “[a]lthough the advent of Guidelines sentencing has changed the role of a probation officer, this change does not carry the constitutional significance urged by appellants”).

430. Stith, *supra* note 11, at 1481–82.

431. See *United States v. Booker*, 543 U.S. 220 (2005).

432. Both the *Booker* remedial majority and the *Rita* majority included Justices Kennedy and Ginsburg as well as Justice Breyer. The other members of the *Booker* remedial majority, Chief Justice Rehnquist and Justice O’Connor, had left the Court by the time *Rita* was decided.

433. *Rita v. United States*, 551 U.S. 338, 351 (2007) (citations omitted).

parties to responding to a presumptively correct report is not remotely “thorough adversarial testing” of the facts it recites. By the time the presentence investigation report is written, the damage is done. Facts have been admitted or established—under the threat of excessive sentences and potentially false denunciations—and have been mechanically catalogued, quantified, and reduced to a sentence by a court official.

The safeguards that the Constitution affords to protect defendants from government overreaching—e.g., the right to remain silent, the right to confront adverse witnesses, the right to compel favorable witnesses to testify, the right to allocute,<sup>434</sup> the right to have counsel present at critical points,<sup>435</sup> and the right to be sentenced based on correct information<sup>436</sup>—presuppose an adversarial approach to fact-finding. Each of these is undermined, if not rendered impotent, by discouraging resort to trial and having a probation officer act as court inquisitor. The defendant’s “rights” offer no protection in such an inquisitorial system.<sup>437</sup>

Two changes would go a long way toward restoring adversarial sentencing.<sup>438</sup> The first is that the acceptance-of-responsibility provision must be eliminated as unconstitutional. That provision, far from reflecting pre-Guidelines practice, designedly does exactly what *Jackson* prescribes: “The evil . . . is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them.”<sup>439</sup> Without that provision, guilty pleas would

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434. See *United States v. Roberts*, 726 F. Supp. 1359, 1367 (D.D.C. 1989) (“Allocution frequently no longer serves any real purpose, since the judge to whom the allocution is addressed either has no discretion at all, or his discretion is so circumscribed that a plea for justice or leniency, or an explanation of such factors as contributions to the public good, the nation, or the community, special family circumstances, a lesser or coerced role in the commission of the offense, or other extenuating circumstances, can accomplish little, if anything, once the prosecutor has made his decision.”) (footnote call numbers omitted), *rev’d on other grounds*, *United States v. Mills*, 925 F.2d 455 (D.C. Cir. 1991). Despite its meaninglessness, courts continued to insist upon the defendant’s right to allocute when the Guidelines were binding. See, e.g., *United States v. Prouty*, 303 F.3d 1249, 1252 (11th Cir. 2002).

435. See *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (“[W]e conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.”).

436. See *United States v. Tucker*, 404 U.S. 443, 447–48 (1972); *Townsend*, 334 U.S. at 739–41.

437. See *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (plurality opinion).

438. Neither of these directly addresses the epidemic of “snitch” testimony that infects the federal system, but having advisory Guidelines arguably already allows courts to hand down lower sentences even if the prosecution is not satisfied with a defendant’s cooperation. Also, eliminating the acceptance-of-responsibility guideline’s deprecation of trials and the probation officer’s hegemony over the facts should constrain the supply of dubious cooperating witnesses by making trials less costly.

439. *United States v. Jackson*, 390 U.S. 570, 583 (1967).

cease to be the default expectation of every defendant and trials would be the norm. “Put[ting] the government to its burden”<sup>440</sup> would again be a right and not a reprehensible affront to the prosecutor and the judge. Prosecutors and defendants would again enjoy roughly equal bargaining positions in resolving cases based on their respective estimations of the government’s proof. A prosecutor would have an incentive to concede any weaknesses in the government’s case by offering the defendant a plea deal. In contrast, the Guidelines system presumes that everything prosecutors allege is almost certainly correct and offers prosecutors little incentive—indeed, little *ability*—to make concessions.

Second, and more importantly, the presentence investigation and its resulting report must be eliminated as incompatible with the adversary system. The pretense that a probation officer is a judicial agent who is necessarily “neutral” and “objective” allows this government bureaucrat to run roughshod over a defendant’s constitutional rights. First, it enables the government to demand that a defendant submit to an intrusive interview, the fruits of which are used to enhance his sentence or for other law-enforcement purposes, in disregard of his right to remain silent. Second, it permits unsubstantiated hearsay and other unopposed testimony to become the basis for an enhanced sentence. Rather than being resolved on the basis of evidence aired in open court, disputes over the facts that drive sentences are resolved by the private intuitions of a probation officer who has no expertise whatsoever in weighing evidence or judging credibility. Finally, the unfounded idea that probation officers, who are not attorneys, are somehow sentencing experts allows courts to rely on their amateur, secret, legal conclusions regarding what sentence is merited. Putting aside the manifest unreliability of an inquisitorial sentencing procedure dependent for its inputs on individuals without proper legal training, the Due Process Clause and the Confrontation Clause forbid even experienced federal judges from undertaking this dubious method of fact-finding.

“Real-conduct” sentencing would, of course, be eliminated by these changes—but that is unavoidable because it is incompatible with adversarial litigation. “Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.”<sup>441</sup> Sentencing would likely be less efficient as well. However, fact-finding through adversarial trials with all their attendant procedural rights and evidentiary constraints are meant to maximize fairness, not efficiency:

We recognize . . . that in some cases jury factfinding may

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440. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.2 (2009).

441. *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.<sup>442</sup>

The Constitution's presupposition that fact-finding is best accomplished by juries is the most significant manifestation of the Framers' healthy mistrust of government officials.<sup>443</sup> The chief virtue of trial by jury, which the Guidelines' creators overlooked in their zeal for uniformity and efficiency, inheres in its dispersal of power away from government actors.<sup>444</sup> That imperative is not subject to bureaucratic abrogation, whatever the supposed benefits may be.

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442. *United States v. Booker*, 543 U.S. 220, 243–44 (2005).

443. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS* 96–98 (1998).

444. *See Blakely*, 542 U.S. at 313 (“There is not one shred of doubt, however, about the Framers’ paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.”); *see also id.* at 306 (“Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).