STATEMENT

OF

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AND

PROFESSOR OF LAW
AT THE S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH

BEFORE

THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

THE EFFECT OF *UNITED STATES V. BOOKER*
ON THE FEDERAL SENTENCING GUIDELINES

ON

FEBRUARY 15, 2005

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Mr. Chairman and Distinguished Members of the Commission:

I am pleased to be here this afternoon to discuss the impact of *United States v. Booker*[1] on sentencings in federal courts. *Booker* should produce only relatively modest changes in federal sentencing practices. After *Booker*, federal district judges are required to "consider" the "advisory" Guidelines in determining an appropriate sentence. But since the touchstone of sentencing remains achieving congressional purposes and since the Guidelines generally reflect those purposes, most sentences should track the Guidelines. If any significant change are needed to the Guidelines, they are required not by *Booker* but by recent crime victims legislation. The Crime Victims Rights Act mandates victim participation in the federal criminal justice process – including the Guidelines process. The Guidelines should be amended to allow victim participation.

In my testimony, I address four specific subjects. In Part I, I explain my view that district courts should give the Guidelines heavy weight in determining an appropriate sentence for offenders and should vary from those Guidelines only in unusual cases for clearly identified and persuasive reasons. Congress has spent many years establishing the Sentencing Commission, appointing its members, approving the Guidelines, and recommending changes where appropriate. Moreover, the Guidelines achieve the congressionally-mandated goals of just punishment as well as deterrence and incapacitation. As a result, a Guidelines sentence will usually be the sentence that best fits the congressional will.

In Part II, I critique the view expressed by several district courts that the Guidelines deserve less weight than I would give them. These courts have, in my opinion, paid insufficient attention to the well-reasoned basis for the Guidelines. For example, several courts have decided to give a defendant's socio-economic status weight in sentencing, despite a clear congressional command that this factor be off limits. Moreover, the approach of these courts will inevitably give similarly situated defendants around the country significantly different sentences, in violation of the congressional command to avoid "unwarranted sentencing disparity."

In Part III, I offer eight specific suggestions for improving the Guidelines in the wake of *Booker*. I recommend:

(A) The Commission should emphasize that certain factors (e.g., race, sex, and socio-economic status) are not to be considered when determining a sentence;

(B) The Commission should provide greater explanation for its policy statements on offender characteristics and departures;

(C) The Commission should list cooperation with federal authorities as a forbidden factor in sentencing determinations unless the government has filed a §

[1] 125 S.Ct. 738 (2005).

5K1.1 motion;

(D) The Commission should clarify that the preponderance of the evidence standard applies to fact-finding under the guidelines;

(E) The Commission should change all of its Policy Statements to Guidelines;

(F) The Commission should create a precise description of sentences that fall outside the Guidelines for non-approved reasons (i.e., "variances"); and

(G) The Commission should require courts to consider any relevant departures before turning to variances.

In Part IV, I turn to the recent crime victims legislation – the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act.[2] Passed last October, this Act guarantees crime victims the right "to be reasonably heard" at any sentencing proceeding.[3] This broad right appears to encompass the right for a victim to be heard regarding Guidelines issues, including issues that might bear on the victim impact of a crime and on restitution. Yet the procedural provisions of the Guidelines leave no room for victims, allowing only the "parties" to a criminal offense to comment on Guidelines issues.[4] These procedures should be changed to give victims the rights that Congress has mandated.

Of course, nothing I say today is meant to comment on the merits of pending or future cases before me.

I. THE SENTENCING GUIDELINES DESERVE HEAVY WEIGHT AFTER *BOOKER*[5]

The sentencing guidelines should receive heavy weight after *Booker*. This is my view, the view of Judge Kopf,[6] and (I suspect) the view of most (though not all) district court judges. This part of my testimony tries to articulate the reasons for this approach to sentencing after *Booker*.

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[2] PUB. L. 108-405, codified at 18 U.S.C § 3771.

[3] 18 U.S.C. § 3771(a)(4).

[4] *See* U.S.S.G. Chapter 6, Part A.

[5] This section of my testimony tracks portions of my opinion in *United States v. Wilson*, 2005 WL 78552 (D. Utah Jan. 12, 2005) (*Wilson I)*. Any changes have been made for purposes of clarity of exposition here, and are not meant to alter the rulings in that opinion.

[6] *See United States v. Wanning*, __ F.Supp.2d ___, 2005 WL 273158 (D. Neb. Feb. 3, 2005).

A. The Court Must Impose a Sentence that Achieves the Congressionally-Mandated Purposes of Sentencing.

Even as modified by *Booker*, the Sentencing Reform Act continues to direct that "[t]he court *shall* impose a sentence sufficient, but not greater than necessary, *to comply with the purposes set forth*" in the Sentencing Reform Act.[7] Those purposes are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .[8]

In light of the congressional command that the court "shall" impose a sentence that is sufficient "to comply with the[se] purposes," the court must impose a sentence that achieves, for example, "just punishment" for an offense and which "afford[s] adequate deterrence to criminal conduct."

B. Guidelines Sentences Generally Achieve the Congressionally-Mandated Purposes of Punishment.

To determine what particular sentence achieves such things as "just punishment" and "adequate deterrence," the court has information that was not available before the passage of the Sentencing Reform Act – specifically, the Sentencing Guidelines. When it passed the Sentencing Reform Act, Congress created the Sentencing Commission. The Commission is an expert agency specifically designed to assist the courts in imposing sentences that achieve the purposes of punishment. Congress gave the Commission significant staff and broad fact-finding powers.[9] In 1987, the Commission promulgated the first comprehensive set of Guidelines. For more than fifteen years, the Commission has refined the Guidelines so that they achieve the congressionally-mandated purposes. This process is on-going. As *Booker* reminds us, "[t]he Sentencing Commission will continue to collect and study [trial court] and appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."[10]

Congress has also had an opportunity to review both the initial Guidelines and all subsequent amendments to insure that they fulfill congressional purposes.[11] In fact, "The Guidelines and the ranges they produced were so important to Congress that it explicitly kept the

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[7] 18 U.S.C. § 3553(a) (emphases added).
[8] 18 U.S.C. § 3553(a)(2).
[9] *See* 28 U.S.C. § 991.
[10] *Booker*, 125 S. Ct. at 766.
[11] 28 U.S.C. § 994(p).

power to accept or reject the initial Guidelines and it retained the power every year thereafter to reject amendments to the Guidelines."[12] With regard to various crimes, Congress has adopted "sense of the Congress" resolutions, encouraging and even requiring that the Commission make various amendments to the Guidelines.[13] For some crimes, Congress even directly amended the Guidelines to provide what it believes is appropriate punishment to achieve its objectives.[14] The result is a congressionally-approved Guidelines system. As Senators Hatch, Kennedy, and Feinstein explained in their *amicus* brief in *Booker*:

> The 1984 Act represents the most comprehensive effort ever undertaken by Congress to reform the federal sentencing system. It is the product of more than a decade of inter-branch and bipartisan legislative efforts in both Houses of Congress . . . . Since 1984, Congress has continued to monitor this area of law and has made revisions to the sentencing guidelines system through amendments to the 1984 Act and other legislation[15]

Congress' creation of the Commission and subsequent approval of the Commission's Guidelines provide strong reason for believing that Guidelines sentences satisfy the congressionally-mandated purposes of punishment. It would be startling to discover that while Congress had created an expert agency, approved the agency's members, directed the agency to promulgate Guidelines, allowed those Guidelines to go into effect, and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve the underlying congressional purposes. The more likely conclusion is that the Guidelines reflect precisely what Congress believes is the punishment that will achieve its purposes in passing criminal statutes.

In 2003, Congress reconfirmed its expectation that courts follow the Guidelines in the

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[12] *Wanning*, 2005 WL 273158 at *3.

[13] *See, e.g.*, PUB. L. 107-273, Div. C, Title I, § 11009(d), Nov. 2, 2002, 116 Stat. 1819 (sense of the Congress that a two-level enhancement should be required where the defendant used body armor); PUB. L. 107-56, Title VIII, § 814(f), Oct. 26, 2001, 115 Stat. 384 (directing Commission to amend Guidelines on computer fraud); PUB. L. 106-310, Div. B, Title XXXVI, § 3651, Oct. 17, 2000, 1143 Stat. 1238 (directing Commission to increase penalties for distributing ephedrine); PUB. L. 105-172, § 2(e), Apr. 24, 1998, 112 Stat. 55 (directing Commission to increase penalties for cloning wireless telephones); PUB. L. 104-237, Title II, § 301, Oct. 3, 1996, 110 Stat. 3102 (directing Commission to amend the Guidelines to increase penalties for distributing methamphetamine; PUB. L. 103-322, Title IV, § 40112, Sept. 13 1994, 108 Stat. 1903 (directing Commission to review disparities between sentences for various sex offenses); PUB. L. 100-690, Title VI, § 6482(c), Nov. 18, 1988, 102 Stat. 4382 (directing Commission to increase penalties for operation of common carrier under the influence of alcohol).

[14] PUB. L. 108-21, Title IV, § 401(j) Apr. 30, 2003, 117 Stat. 673 (changing departure standards for child sex offenses).

[15] *Brief of Amici Curiae*, *United States v. Booker* at 2, 4.

recently-adopted "Feeney Amendment."[16] The Feeney Amendment to address what it called "the serious problem of downward departures from the Federal Sentencing Guidelines by judges across the country."[17] The Feeney Amendment was meant to "put strict limitations on departures by allowing sentences outside the guidelines range only upon grounds specifically enumerated in the guidelines as proper for departure. This would eliminate ad hoc departures based on vague grounds, such as 'general mitigating circumstances.'"[18]

Among the Feeney Amendment's provisions was one requiring district courts to state in writing their reasons for departing from the sentencing guidelines:

> The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence–
> . . . is outside the [Guidelines] range . . . the specific reason for the imposition of a sentence different from that described, *which reasons must also be stated with specificity in the written order of judgment and commitment* . . . .[19]

This provision, like all other provisions in the Feeney Amendment, remains in effect after *Booker*. Accordingly, it serves as a congressional reminder to the district courts that the Guidelines are to receive significant weight, and that if departure occurs, the court must provide a *written* explanation that will be closely examined on appellate review.

For all these reasons, the congressional intent underlying the Sentencing Reform Act, as modified by the Feeney Amendment, will generally be best implemented by a Guidelines sentence.

C. The Guidelines Generally Achieve "Just Punishment."

Even apart from congressional approval of the Guidelines, considerable evidence suggests that Guidelines sentences serve the congressionally-mandated purposes of punishment.[20] Congress' first-identified purpose of punishment is for the sentence "to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense."[21] The Guidelines well serve this fundamental purpose of sentencing.

Just punishment means, in essence, that the punishment must fit the crime. In the Senate Report accompanying the Sentencing Reform Act, the Act's sponsors explained:

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[16] *See generally United States v. Van Leer*, 270 F.Supp.2d 1318 (D. Utah 2003).

[17] 149 CONG. REC. H3061 (Mar. 27, 2003) (statement of Rep. Feeney).

[18] *Id.*

[19] 18 U.S.C. § 3553(c) (emphasis added).

[20] *See generally*, Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

[21] 18 U.S.C. § 3553(a).

> [Just punishment] – essentially the "just deserts" concept – should be reflected clearly in all sentences; it is another way of saying that the sentence should reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing recurrence of the offense. From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.[22]

The concept of "just punishment" requires the court to consider society's views as to appropriate penalties, not just a judge's own personal instincts. As the Senate Report noted, the court should consider "the public's standpoint" in developing an appropriate sentence. Moreover, Congress expected that the Sentencing Reform Act would generally produce sentences that did "not differ substantially" between similarly-situated offenders. If "just punishment" meant nothing more than what a single judge thought was just punishment, then such uniformity of penalties would be impossible.

In determining society's views as to the appropriateness of federal sentences, we are fortunate to have very concrete data. In their informative book *Just Punishments: Federal Guidelines and Public Views Compared*, Professors Peter Rossi and Richard Berk systematically compare Guidelines sentences with sentences that the public would impose. By means of national public opinion survey, they studied 89 separate crimes, ranging in seriousness from illegal drug possession to kidnaping, including many of the crimes most frequently prosecuted in federal court.

Professors Rossi and Berk found considerable convergence between Guidelines sentences and the public's view of appropriate sentences. To provide a few illustrations:

- The Guidelines call for 39.2 years in prison for kidnaping when a victim is killed; the public believes 39.2 years is appropriate.

- The Guidelines call for 9.1 years in prison for tracking in cocaine; the public believes 10 years is appropriate.

- The Guidelines call for 4.8 years in prison for bank robbery without a weapon; the public believes 4 years is appropriate.

- The Guidelines call for 2.5 years for a firearms dealer keeping poor sales records;

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[22] S. REP. 98-225, 1984 U.S.C.C.A.N. 3182, 3258-59.

the public believes 3 years is appropriate.[23]

From their data, Professors Rossi and Berk concluded that the Guidelines generally track public opinion:

> [T]here is a fair amount of agreement between sentences prescribed in the guidelines and those desired by the members of the sample. The agreement is quite close between the means and the medians of respondents' sentences and the guidelines prescribed sentences. There is also quite close agreement between how individual respondents rank crimes and the way in which the guidelines rank the same crimes.
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> . . .
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> We interpret this major finding to mean that the ideas about sentencing in the guidelines and the interviews with respondents reflect societal norms concerning punishment for those who violate the criminal laws. Both the [sentencing] commission and the public converge on roughly the same sentences, because the commission sought to write guidelines that would be acceptable to major constituencies. . . . [T]he commission relied heavily on the central tendencies in past sentencing practices in federal courts as a kind of template for its sentencing rules, a strategy that used those practices as a proxy for public preferences. Using this template, the commission avoided both overly lenient and overly harsh sentences and wrote sentencing rules that came close to the mainstream consensus.[24]

It is important to note a few areas of disagreement between the public's views and Guidelines sentences. The public failed to support the Guidelines' differentially harsh treatment of distribution of crack cocaine (as compared to powder cocaine); nor did it support the tough sentences for environmental crimes, violations of civil rights, and certain bribery and extortion crimes.[25] On the other hand, the public supported somewhat longer sentences for marijuana trafficking and for crimes endangering the physical safety of victims and bystanders (e.g., adding poison to over-the-counter drugs).[26] But these disagreements were the exceptions; the rule was that public opinion tracked Guidelines sentences.

Apart from the details of this public opinion polling, it is hardly surprising to find that the Guidelines track public views on appropriate punishment. The Guidelines were, after all, created through a democratic process. The public's elected representatives – Congress – created the Commission, approved the Guidelines, and then adjusted them over the years in an on-going

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[23] *Id.* at 92-93, tbl. 5.5 (comparing Guidelines sentence with median sentence from sample).

[24] *Id.* at 208.

[25] *Id.* at 99.

[26] *Id.*

dialogue with the Commission. In light of these facts, it should be generally presumed that the Guidelines reflect the public's views on appropriate punishment.

This general convergence between public opinion and Guidelines sentences creates a strong reason for generally following Guidelines. Because sentencing must "promote respect for the law" and "provide just punishment for the offense,"[27] sentences generally ought to track societal norms. After all, criminal sentencing is the way in which society expresses its views on the seriousness of criminal conduct. To be sure, it is possible that a case can be made for deviating downward (or upward) from public opinion. In the area of civil rights offenses, for example, a criminal sentence might well seek to lead, rather than follow, public opinion by specially protecting minority rights. But aside from such unusual circumstances, Guidelines sentences will generally create "just punishment" by reflecting the public's judgment about the seriousness of an offense.

D. The Guidelines Generally Achieve Crime Control Purposes.

The court is also required to impose a sentence that serves crime control purposes – e.g., deterrent and incapacitative purposes. Congress has specifically directed that all sentences must "afford adequate deterrence to criminal conduct" and "protect the public from further crimes of the defendant."[28] Essentially, these provisions require the court to determine whether a particular sentence is a cost-effective means of preventing crime, either by deterring potential criminals (general deterrence) or incapacitating criminals who would otherwise have committed more crimes (specific deterrence or incapacitation).

It is difficult for an individual judge to make such determinations. Focusing on "adequate deterrence," for example, the court must assess the potential impact of its sentences on potential offenders. As a starting point, this might require the court to take judicial notice of the fact that crime rates are now at their lowest levels in thirty years. Violent crime victimization rates have dropped from 47.7 per 1,000 population in 1973 to 22.8 in 2002, an amazing 52% reduction.[29] In other words, Americans today are only half as likely to fall victim to violent crime as they were in 1973. That drop in the crime rate has coincided with an increase in the number of prisoners behind bars, including substantial increases in the number of federal prisoners. Statistics reveal that 2002 was not only the year of the lowest victimization rate in recent history, but also the year with the highest prison population. Is this purely a coincidence? Or a consequence?

One recently published study by a well-known social scientist concluded that a significant part of the decline in violent crime is attributable to increased incarceration.

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[27] 18 U.S.C. § 3553(a)(2).

[28] 18 U.S.C. § 3553(a)(2)(B) & (C).

[29] U.S. Dept. of Justice, Bureau of Justice Statistics, National Crime Victimization Survey, Violent Crime Trends, 1973-2002, *available at* www.ojp.usdoj.gov/bjs.

Professor Steven Levitt concluded that increases in the size of the prison population, along with increases in the number of police and a few other factors could fully explain the drop in crime in the 1990s.[30] His study is not the only one to point in this direction. An expanding body of literature suggests that incarceration of dangerous persons in recent years has demonstrably reduced crime, through both incapacitative and deterrent effects.

Of particular interest in considering Guidelines sentences may be a recent study assessing the deterrent effect of state truth-in-sentencing laws.[31] Since 1994, Congress has provided some incentive grants to states who can demonstrate that violent offenders serve at least 85% of their sentences. Interestingly, these state truth-in-sentencing laws would track the Guidelines, which demand that prisoners serve 85% of their sentences. A sophisticated regression analysis comparing states with and without such truth-in-sentencing programs found that the laws decreased murders by 16%, aggravated assault by 12%, robberies by 24%, rapes by 12%, and larcenies by 3%. There was a "substitution" by offenders into less risky property crimes: burglaries increased by 20% and auto thefts by 15%. Overall, the net reductions in crime were substantial.

These studies focus on a deterrence effect from criminal penalties. Other studies confirm the obvious point that incarcerating an offender prevents him from repeating his crimes while he is in prison.[32]

More generally, estimates of both a deterrent and an incapacitative effect have suggested that each 1% increase in the prison population produces approximately 0.10% to 0.30% fewer index crimes.[33] Renowned criminologist James Q. Wilson, for example, has opined that this "elasticity" of crime with respect to incarceration is between 0.10% and 0.20%.[34] Professors Thomas Marvell and Carlisle Moody have examined crime statistics and prison populations for 49 states over the period 1971-89.[35] They found that a 1% increase in prison population results

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[30] Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Expalin the Decline and Seven That Do Not*, 18 J. ECON. PERSPECTIVES 163 (2004).

[31] Joanna M. Shepherd, *Police, Prosecutors, Criminals and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509 (2002).

[32] Peter W. Greenwood et al., *Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law*, *in* THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY *543* (David Schichor & Dale K. Sechrest eds. 1996); Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002).

[33] Here I draw on the helpful analysis of the studies found in John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 12-14 (1998).

[34] James Q. Wilson, *Prisons in a Free Society*, 117 PUB. INTEREST 37, 38 (Fall 1994).

[35] Thomas Marvell & Carlisle Moody, *Prison Population Growth and Crime Reduction*, 10 J. QUANTITATIVE CRIMINOL. 109 (1994).

in approximately 0.16% fewer reported index crimes. Professor Steven Levitt has found a higher elasticity – about 0.30% or more – in a recent sophisticated, comparative analysis of twelve states that experienced system-wide restraints on prison populations imposed by federal courts.

The point of recounting these statistics is not to suggest that the court will make a finding on the elasticity of crime with respect to incarceration before imposing a sentence — far from it. Instead, the point here is that the court is poorly suited to consider elasticities and other factors that would go into a sensible deterrence calculation. On the other hand, the Sentencing Commission, with its ability to collect sentencing data, monitor crimes rates, and conduct statistical analyses, is perfectly situated to evaluate deterrence arguments.

Further problems abound for an individual court in considering deterrence issues. Congress has directed that a sentence provide "adequate" deterrence to future crimes. Presumably, determining adequacy requires some consideration of not only the number of crimes to be deterred, but also the harm stemming from those crimes. While a court may be well situated to determine the harms of the particular crime before it (through victim impact statements, police reports, and the like), it would be hard pressed to give more than an educated estimate of the general harms imposed by a class of crimes. On this point, the available data suggests that the costs are staggeringly high. One of the most comprehensive analyses was done by Ted R. Miller and his colleagues for the National Institute of Justice in 1996.[36] They evaluated only the costs of crime to crime victims, ignoring costs to the criminal justice system and other social costs associated with the fear of crime. They separated victims' costs into two parts: tangible and intangible losses. Using sophisticated methodology, Miller and his colleagues calculated a total loss per criminal victimization that ranged from $2.9 million for various forms of murder to $87,000 for rape and sexual assault to $8,000 for robbery to $1400 for burglary to $370 for larceny.[37] They also computed the aggregate annual victim cost in the United States from crime – $450 billion as of 1990, or more than $1800 per U.S. resident.[38] Another more recent analysis using a different methodology reported an even higher aggregate burden from crime on the United States – in the neighborhood of $1 trillion annually.[39]

To be sure, one can dispute these figures. But the important point for present purposes is that determinations of the "adequacy" of a deterrent to, say, armed bank robbery is difficult to make in an individual case. The Sentencing Commission, though, is well situated to evaluate such issues. As *Booker* explains, "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."[40]

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[36] U.S. DEPT. OF JUSTICE, NAT'L INST. OF JUSTICE, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996).

[37] *Id.* at 9.

[38] *Id.* at 17.

[39] David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611 (1999).

[40] *Booker*, 125 S. Ct. at 747.

If there were any doubt about the Commission's fact-finding abilities on deterrence issues, it would be well to remember – once again – that Congress has approved the Guidelines. Congress has ample data gathering abilities of its own through hearings and other devices. The Supreme Court has recognized that Congress "may inform itself through factfinding procedures . . . that are not available to the courts."[41] In light of the congressional sanctioning of the Guidelines, courts should be reluctant to offer judgments about crime control issues. Congress' judgment is entitled to considerable weight on this subject as well.

E. Rehabilitation Does Not Justify a Shorter-Than-Guidelines Sentence.

The fourth purpose of punishment specified by Congress is "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . ."[42] This purpose can be generally described as "rehabilitation." Some might argue that Guidelines sentences are contrary to rehabilitative efforts. But the Commission considered this goal in drafting the Guidelines.[43] More important, in the many cases involving substantial prison sentences, rehabilitation is a subordinate consideration to just punishment and crime control. Congress itself directed the Commission to insure that the Guidelines "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocation training, medical care, or other correctional treatment."[44] The Senate Report explained that the thinking behind this directive was to place rehabilitation as a secondary consideration where serious crimes were involved:

> It is understood, of course, that if the commission finds that the primary purpose of sentencing in a particular kind of case should be deterrence or incapacitation, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment if that is determined to be the best means of assuring such deterrence or incapacitation, notwithstanding the fact that such a sentence would not be the best means of providing rehabilitation.[45]

Another reason for placing rehabilitation in a secondary position is that the court has no way of determining whether a defendant has been rehabilitated. The court cannot determine at time of sentencing whether after completing, for example, 100 months of his sentence, a defendant will have rehabilitated himself to the point where he is no longer a threat to society. Nor does any parole mechanism exist under the Sentencing Reform Act to make such a

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[41] *See e.g., Bush v. Lucas*, 462 U.S. 367, 389 (1983).

[42] 18 U.S.C. § 3553(a)(2)(D).

[43] *See* U.S.S.G. § 1A1.1 (policy statement). *Cf.* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992) (arguing that Commission should have delineated its analysis further).

[44] 28 U.S.C. § 924(k).

[45] S. Rep. 98-225, 1984 U.S.C.A.N. 3182, 3259 n. 288.

determination. The Sentencing Reform Act not only created the Guidelines but also abolished parole. The Senate Report accompanying the Sentencing Reforming Act suggested that a parole-based sentencing scheme had failed and had led to the many discrepancies between sentences: "[M]ost sentencing judges as well as the parole commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions."[46]

After *Blakely*, some courts and commentators began to consider whether it would be appropriate for judges to revive the parole procedures.[47] For example, it could be argued that "if the [Sentencing Reform Act] is unconstitutional, parole is back."[48] *Booker*, however, never hints at a possible revival. To the contrary, it makes clear that the only unconstitutional provisions in the Act are two provisions regarding the binding nature of the Guidelines.[49] In light of *Booker*'s silence it must be presumed that the Sentencing Reform Act's abolition of parole remains. Because parole is not a possibility for defendants serving prison terms, courts should follow the Guidelines' lead in giving rehabilitation a subsidiary role in determining the prison sentence.

F. The Limited Effect of the Parsimony Provision.

One possible reason for avoiding a Guidelines sentence might be the so-called "parsimony provision," which provides that "the court shall impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes [of punishment] set forth in [the Sentencing Reform Act]."[50] It is possible to argue that this provision requires the courts to impose sentences below the Guidelines range, because Guidelines sentences are not parsimonious.[51] This is an interesting argument worthy of discussion.

Determining what the parsimony provision means is difficult. As Professors Marc Miller and Ronald Wright have noted, "[t]he full history and possible meanings of the parsimony provision, and of all of section 3553(a), have not yet been written."[52] While they trace the

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[46] S. REP. No. 98-225, 1984 U.S.C.A.N. 3182, 3224.

[47] *See, e.g.*, *Mueffelman*, 327 F. Supp.2d at 96 ("[Plainly there is a problem with reinstituting an indeterminate system, when there is no longer parole.").

[48] Ian Weinstein & Nathaniel Z. Marmur, *Federal Sentencing During the Interregnum: Defense Practice as the Blakely Dust Settles*, 17 FED. SENT. R. 51, 2004 WL 2566155, at *4 (Oct. 2004).

[49] *See Booker*, 125 S. Ct. at 757.

[50] 18 U.S.C. 3553(a) (emphasis added).

[51] *See* http://sentencing.typepad.com/sentencing_law_and_policy (Jan. 12, 2005) (The Power of Parsimony (and Justice Breyer's Notable Omission)) (Prof. Douglas Berman tentatively advancing this suggestion).

[52] Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heat(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 810 n.57 (1999).

concept to Professor Norval Morris's 1974 book *The Future of Imprisonment*,[53] the concept seems to extend all the way to back to general notions of utilitarianism espoused by Jeremy Bentham.[54] With regard to the Sentencing Reform Act, the relevant legislative history shows that, much of the remaining Act originated not in the Senate but in the House (which desired a more flexible guidelines system).[55]

After reviewing this history, Professors Miller and Wright concede that the parsimony provision has played "almost no role in caselaw,"[56] but maintain that "the parsimony concept is powerful evidence . . . that both the Senate and the House were attempting to pass a statute giving more substantial power to sentencing judges to impose a sentence outside the guidelines range."[57] This conclusion about legislative history seems debatable. But for present purposes, the critical issue is the meaning of the language congress ultimately enacted. It requires a court to impose a sentence "*sufficient*, but not greater than necessary, to comply" with purposes of Sentencing Reform Act.[58] The court must, therefore, first determine what is a "sufficient" sentence. For the reasons given above, the Guidelines ranges are designed to impose sufficient punishment and appear to impose sufficient punishment in most cases.

Moreover, the Commission was itself bound by the parsimony provision.[59] While some have argued that the Commission gave insufficient attention to the provision,[60] the fact remains that the Commission promulgated guidelines that it viewed as parsimonious. If the Commission was mistaken and the ranges were not parsimonious, Congress could have simply rejected them. Congress, of course, did nothing of the sort. To the contrary, in the 15 years since adoption of the Guidelines, the general tenor of Congressional efforts has been to constantly prod the Guidelines upward.

There may be an argument that the parsimony provision generally requires a court to impose a sentence at the low end of any applicable Guidelines range. This is something that

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[53] *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 60-62 (1974).

[54] *See* JEREMY BENTHAM, OF THE INFLUENCE OF TIME AND PLACE IN MATTERS OF LEGISLATION (1843) (presenting utilitarian theory of punishment that rests on the idea of no unnecessary punishment).

[55] *See also*, H.R. CONF. REP. 98-1159, 1984 U.S.C.C.A.N. 3710; H.R. CONF. REP. 98-1159, 1984 U.S.C.C.A.N. 3710, 3711; *see generally*, MILLER & WRIGHT, *supra.*, 2 BUFF. CRIM. L. REV. at 744.

[56] *Id.*; *cf. United States v. Davern*, 970 F.2d 1490, 1498 (6th Cir. en banc)(finding parsimony provision of limited significance).

[57] *Id.* at 746-47.

[58] 18 U.S.C. § 3553(a) (emphasis added).

[59] *See* 28 U.S.C. § 994(b)(1) (Guidelines shall comply with all "pertinent provisions" of Title 18.).

[60] *See* Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1269 n.9 (2004).

judges generally do today; the vast majority of judges sentence at or toward the very bottom of any applicable Guidelines range.[61] But the application of the parsimony provision to sentences *within* a Guidelines range is something I have not yet had to resolve in individual cases. Generally I have had hearings where the government recommends that the defendant be sentenced at the low end of the Guidelines range that applies to him. Because I have usually been inclined to follow that recommendation, it has been enough for me to conclude that a low-end sentence within a Guidelines range is parsimonious, leaving for another day whether only a sentence at the low end of the range would be parsimonious.

G. The Guidelines Should Be Followed to Avoid Unwarranted Sentencing Disparity.

A final reason for giving heavy weight to the Guidelines is to avoid unwarranted sentencing disparity. Avoiding unwarranted sentencing disparity was the main goal of the Sentencing Reform Act. The Guidelines were primarily formulated to "eliminate the unwarranted disparities that proliferated under the prior sentencing regime and to foreclose the consideration of race, gender, and other illegitimate factors at sentencing."[62] As *Booker* explains, Congress' "basic statutory goal in enacting the Guidelines was to provide a sentencing system that diminishes sentencing disparity"[63] and "to move the sentencing system in the direction of increased uniformity."[64] In an effort to achieve this end, "Congress directed the [Sentencing] Commission . . . to provide certainty and fairness in sentencing and avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted."[65]

While *Booker* renders the Guidelines advisory, the court is still obligated to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct . . . ."[66] The only way of avoiding gross disparities in sentencing from judge-to-judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines. If each district judge follows his or her own views of "just punishment" and "adequate deterrence," the result will be a system in which prison terms will "depend on 'what

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[61] *See* Frank O. Bowman, III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS L. REV. 299, 338 (2000) (about 80% of all drug offenders sentenced at or below the Guidelines minimum and about an addition 10% sentenced in the lower half of the range).

[62] *Brief of Amici Curiae, United States v. Booker* at 3.

[63] *Booker*, 125 S. Ct. at 743.

[64] *Id.* at 761.

[65] *Brief of Amici Curiae, United States v. Booker* at 16 (internal citations omitted).

[66] 18 U.S.C. § 3553(a)(6).

the judge ate for breakfast' on the day of sentencing" and other irrelevant factors.[67] Such a result would be intolerable in a society committed to the rule of law and to equal treatment of offenders regardless of race, class, gender, or geographical location. It would, in short, be a return to the pre-Guidelines days, which "produced astounding disparities among the sentences that were imposed on defendants convicted of the same offense with similar backgrounds within different judicial districts across the country – and even among different judges in the same district."[68] Or, as Judge Kopf colorfully put it in a recent opinion, "We [judges could] end up selecting the sentencing goal(s) of the day (and thus the sentence of the moment with much the same whimsy and lack of coherence as children picking the flavor of the day at the ice cream shop."[69]

To be sure, reasonable minds may differ about whether the Guidelines are the best standard against which to measure the fairness of sentences. It is no secret that some judges believe sentences are too harsh, although the degree of judicial dissatisfaction with the Guidelines is easy to overstate.[70] The fundamental fact remains, however, that the Guidelines are the *only* standard available to all judges around the country today. For that reason alone, the Guidelines should be followed in all but the most exceptional cases.

For all these reasons, I have concluded that in exercising my discretion in imposing sentences, I should give heavy weight to the recommended Guidelines sentence in determining what sentence is appropriate. I will, in the exercise of my discretion, only deviate from those Guidelines in unusual cases for clearly identified and persuasive reasons. This is the only course that implements the congressionally-mandated purposes behind imposing criminal sentences.

II. CONSIDERING THE GUIDELINES AS ONLY ONE FACTOR AMONG MANY IS INAPPROPRIATE.[71]

A. Some Courts Consider the Guidelines as Only One of Several Factors.

In adopting my approach to sentencing, I am aware that other judges have advocated a more flexible approach to considering Guidelines recommendations. In particular, Judge

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[67] *Blakely v. Washington*, 124 S.Ct. 2531, 2533 (2004) (Breyer, J., dissenting). *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and Key Compromises Upon Which They Rest*, 17 HOFSTRA L.REV. 1 (1988).

[68] *Brief of Amici Curiae*, *United States v. Booker* at 4.

[69] *Wanning* 2005 WL 273158 at * 4.

[70] *See* U.S. SENTENCING COMMISSION, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES (March 2003) (finding that approximately 38.4% of responding district court judges reported that the Guidelines' attained a "higher achievement," 38.6% reported "middle achievement," and 22.9% reported "lower achievement").

[71] This section of my testimony tracks portions of my opinions in *United States v. Wilson*, 2005 WL 273168 (D. Utah Feb. 2, 2005) (*Wilson II).* Any changes have been made for purposes of clarity of exposition here, and are not meant to alter the rulings in that opinion.

Adelman of the Eastern District of Wisconsin in *United States v. Ranum*[72] has thoughtfully advocated considering the Guidelines as only one factor among many. *Ranum* began – as this court did in *Wilson I* – by reciting the congressionally-mandated purposes of criminal sentences laid out in 18 U.S.C. § 3553(a)(2). *Ranum* went on to reject this court's analysis in *Wilson I*, concluding that:

> The directives of *Booker* and § 3553(a) make clear that courts may no longer uncritically apply the guidelines and, as one court suggested, 'only depart . . . in unusual cases for clearly identified and persuasive reasons.' The approach espoused in *Wilson* is inconsistent with the holding[] of . . . *Booker*, directing courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore.[73]

Ranum then listed various factors which were, in its view, relevant to sentencing but excluded from consideration by the Guidelines – e.g., a defendant's socioeconomic status, his family ties and responsibilities, his lack of guidance as a youth, and so forth.[74] *Ranum* held these exclusions "cannot be squared" with the congressional directive that courts must consider "the history and characteristics of the defendant" in determining an appropriate sentence.[75]

Ranum also noted that one of the purposes of sentencing – providing the defendant with appropriate education, training, treatment or medical care – might conflict with a Guidelines-mandated prison sentence. Applying this approach to calculate defendant Ranum's sentence, the court imposed a sentence of a year and a day for bank fraud – well below the recommended minimum Guidelines sentence of 37-46 months. The rationale for this lower sentence included the defendant's motivation for the fraud (he was attempting to keep his business afloat) as well as the significant "collateral consequences" of a criminal conviction (he lost his job in the banking industry).

Judge Adelman's analysis is carefully developed. Moreover, it proven influential to a few courts. Shortly after *Ranum* was decided, Judge Pratt of the Southern District of Iowa noted the disagreement between *Wilson* and *Ranum*, electing to side with *Ranum*. In *United States v. Myers*,[76] Judge Pratt concluded that "the Guideline provisions and the statutory provisions under section 3553(a) often contradict one another."[77] *Myers* cited the same factors mentioned in *Ranum* – a defendant's socioeconomic status, his family ties and responsibilities, his lack of guidance as a youth, and so forth – as factors unfairly excluded from consideration by the

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[72] *See* Defendant's Memo. on Application of *U.S. v. Booker* at 13 (citing, *Ranum*, 2005 WL 78552 (E.D. Wisc. Jan. 19, 2005)).

[73] *Ranum*, 2005 WL 161223, at *1.

[74] *Id* at 1, 2. (citing, *inter alia*, U.S.S.G. §§ 5H1.6, 5H1.5, 5H1.12) (policy statement).

[75] 18 U.S.C. § 3553(a)(1).

[76] 2005 WL 165314 (S.D. Iowa Jan. 26, 2005).

[77] *Id.* at *2.

Guidelines. Based on the *Ranum* methodology, defendant Myers received a sentence of probation for illegal possession of a firearm – a sentence well below the Guidelines range (20 to 30 months in prison). Similarly, in *United States v. West*,[78] Judge Sweet of the Southern District of New York noted the competing approaches of *Wilson* and *Ranum*. He also elected to follow the more flexible approach of *Ranum*, concluding that § 3553(a) requires courts "to consider a host of individual variables and characteristics excluded from those calculations called for by the Guidelines."[79] Finally, Judge Bataillon of the District of Nebraska tracked *Ranum*'s approach in *United States v. Huerta-Rodriguez*.[80] He rejected the government's position (which tracked *Wilson*) that "a criminal sentence should fall within the Guidelines range, absent highly unusual circumstances."[81] Instead, he determined he would make a more individualized assessment of the appropriate penalty "with the knowledge that the Guidelines do not necessarily represent a reliable indication of reasonableness in every case . . . ."[82]

B. There Are Compelling Reasons for Giving Great Weight to the Guidelines.

Afer reviewing these opinion, I carefully considered whether to revise my earlier approach and follow the course charted by *Ranum* and other courts. It was troubling to thinkthat some defendants might receive different treatment of their claims in my court than in other courts. After careful review of the issues, however, I remain convinced that my approach is correct. I am also encouraged that Judge Kopf, in a thoughtful opinion, has reached the same conclusion.[83] I suspect that much judges will ultimately adopt something like the approach Judge Kopf and I have sketched out.

With respect, *Ranum*'s more flexible approach is flawed. First, it significantly alters without clear justification the Guidelines approach of giving limited effect to offender characteristics. I cannot agree with *Ranum*, for example, that an offender's socioeconomic status is a relevant factor in determining a sentence. Moreover, the Commission has carefully calibrated the extent to which offender characteristics determine a sentence. Unlike the Guidelines, *Ranum* offers no real basis for deciding which offender characteristics to consider and how much consideration to give them.

Second, *Ranum* gives undue emphasis to the prospect that an offender might become rehabilitated while in prison. In enacting the Sentencing Reform Act, Congress specifically gave rehabilitation a secondary role in determining prison sentences. The Guidelines properly implement this congressional determination.

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[78] 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005).
[79] *Id*. at *2.
[80] 2005 WL 318640 (D. Neb. Feb. 1, 2005).
[81] *Id.* at *3.
[82] *Id.* at 8.
[83] *See Wanning*, 2005 WL 273158 at *2-4 (endorsing *Wilson*).

Third, *Ranum* pays little attention to the requirement that courts avoid unwarranted sentencing disparity. Only close adherence to the Guidelines offers any prospect of treating similarly-situated offenders equally.

1. The Guidelines Handle Specific Offender Characteristics Appropriately.

The central disagreement between *Wilson* and *Ranum* is the weight to be given to various offender characteristics. *Ranum* holds that the Guidelines "cannot be squared" with the congressional directive that courts must consider "the history and characteristics of the defendant" in determining an appropriate sentence.[84] *Ranum* argues that the Guidelines unfairly block consideration of relevant offender characteristics:

> [U]nder the guidelines, courts are *generally forbidden* to consider the defendant's age, U.S.S.G. §5H1.1, his education and vocational skills, § 5H1.2, his mental and emotional condition, § 5H1.3, his physical condition including drug or alcohol dependence, § 5H1.4, his employment record, § 5H1.5, his family ties and responsibilities, § 5H1.6, his socio-economic status, § 5H1.10, his civic and military contributions, § 5H1.11, and his lack of guidance as a youth, § 5H1.12. The guidelines' prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant. The only aspect of a defendant's history that the guidelines permit courts to consider is criminal history.[85]

This part of *Ranum* has been specifically endorsed by *Myers*[86] and *West*.[87]

At the outset, there is reason to be skeptical of the assertion that the Guidelines are inconsistent with the congressionally-created purposes of sentencing. As explained above, the Guidelines are a carefully-calibrated system put in place by Congress.[88] In 1984, after nine years of bipartisan deliberation and compromise, Congress passed the Sentencing Reform Act to create a guidelines system. The Act created an expert agency – the Sentencing Commission – to determine ranges of appropriate sentences. In developing the Guidelines, the Commission developed sentencing ranges based on past practice as reflected in 10,000 presentence reports and additional data on over 100,000 federal sentences imposed in the immediate preguidelines era. The Commission then adjusted sentencing ranges for compelling reasons, including directions from Congress. In the seventeen years since the promulgation of the Guidelines, the Commission has continued to closely monitor the Guidelines, making adjustments where

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[84] 18 U.S.C. § 3553(a)(1).

[85] *Ranum*, 2005 WL 161223, at *1 (emphasis added).

[86] 2005 WL 165314 (S.D. Iowa Jan. 26, 2005). *But see Wanning*, 2005 WL 273158 at *2 (specifically rejecting *Myers*).

[87] 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005).

[88] *See generally* U.S. SENTENCING COMM'N 15 YEAR REPORT at iv-xix.

appropriate. Congress, too, has been heavily involved in this calibration, reviewing all of the amendments to the Guidelines and making amendments itself where appropriate.[89] As Senators Hatch, Kennedy, and Feinstein explained in their *amicus* brief in *Booker*, "Since 1984, Congress has continued to monitor this area of law and has made revisions to the sentencing guidelines system through amendments to the 1984 Act and other legislation."[90]

In light of this history, it would be remarkable to discover (as *Ranum* claims) that significant parts of the Guidelines "cannot be squared" with the congressionally-created purposes of sentencing.[91] Instead, the more logical conclusion is that the Guidelines — including its handling of offender characteristics – generally reflect congressional purposes.

a. Offender Characteristics Can Be Considered Within the Guidelines.

Ranum contends that the Guidelines "forbid" consideration of offender characteristics. This contention appears wrong. With only a few well-justified exceptions (such as the racial characteristics of a defendant, discussed below), the Guidelines policy statements specifically allow use of such characteristics.[92] In the introductory commentary to the Guidelines offender characteristics section, the Commission explains that certain circumstances are "not *ordinarily* relevant" to the determination of whether to impose a sentence "*outside* the applicable Guideline range."[93] However, the Commission continues: "Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence *within* the applicable guideline range or to the determination of various other incidents of an appropriate sentence . . . ."[94] Moreover, the Commission goes on to explain that there may be "exceptional cases" in which an offender characteristic, either alone or in combination with other unusual circumstances of a case, would be grounds for a departure from the Guidelines.[95] Thus, the Guidelines limit the weight to be given to most offender characteristics, not forbid that they be given any weight.[96] There are, however, several forbidden characteristics. These characteristics should be forbidden for reasons that I explain in another section of my testimony.[97]

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[89] *See Wilson*, 2005 WL 78552, at 5 (collecting examples of amendments made to the Guidelines).

[90] *Brief of Amici Curiae*, *United States v. Booker* at 2, 4.

[91] *Ranum*, 2005 WL 161223, at *1.

[92] *See* U.S.S.G., Part H (policy statements); *see also United States v. Williams*, 503 U.S. 193 (1992) (policy statements are an "authoritative guide" to the meaning of the Guidelines).

[93] U.S.S.G., Part H, Introductory Commentary (policy statement) (emphases added).

[94] *Id.* (policy statement).

[95] *Id.* (policy statement).

[96] *See* U.S. SENTENCING COMM'N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES at A-30 (2003)

[97] *See* Suggested Revisions to the Guidelines, Part III.A, *infra.*

b. Offender Characteristics Deserve the Modest Weight Assigned by the Commission.

Apart from the forbidden characteristics, many other offender characteristics can generally be taken into account (as explained earlier) only within the relevant Guidelines range. *Ranum* appears to find this restriction too confining and contends that the courts should routinely consider these factors as reasons for going outside the Guidelines. *Ranum* singles out as possibly justifying outside-the-Guidelines sentences such factors as family ties and responsibilities, lack of guidance as a youth, age, vocational skills, mental and emotional condition, physical condition including drug or alcohol dependence, employment record, and civic and military contributions.[98]

This approach is inconsistent with congressional mandates. In passing the Sentencing Reform Act, Congress required the Sentencing Commission to investigate whether and to what extent many of these factors were relevant to sentences. Congress directed that, in creating the Guidelines, the Commission "shall consider whether the following matters, among others, with respect to the defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance – [listing factors]."[99] Most of the restrictions that *Ranum* finds problematic have been in place since the Guidelines initial promulgation in 1987. Congress has had nearly two decades to reject any of these restrictions if they were inconsistent with the basic purposes of sentencing. Instead, Congress has (if anything) moved to tighten up these restrictions.

One illustration comes from the family ties Guidelines, which provides that "family ties and responsibilities" are "not ordinarily relevant" to determining whether a sentence should be outside the Guidelines.[100] Congress has not questioned this provision since its promulgation in November 1, 1987. To the contrary, in 2003 in the PROTECT Act, Congress directly amended this policy statement for certain cases. Congress provided that for child sex abuse cases, this provision would be changed from indicating that family ties "are not ordinarily relevant" to plainly state that family ties "are *not* relevant" in determining whether to impose a sentence below the Guidelines range.[101]

To be sure, this amendment (like others in the PROTECT Act) directly applies only to certain child sex abuse offenses. But this amendment is surrounded by many additional amendments designed to make it more difficult for courts to depart downward from the Guidelines in all cases. For instance, the PROTECT Act required district courts to include written reasons for any departure in the judgment and commitment order and to base all departures on factors furthering the statutory purposes of sentencing.[102] The Act also directed

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[98] *Ranum*, 2005 WL 161223, at *1.
[99] 28 U.S.C. § 994(d).
[100] U.S.S.G. § 5H1.6 (policy statement).
[101] Pub. L. 108-21, Section 401(b)(4) (eff. Apr. 30, 2003) (emphasis added).
[102] 18 U.S.C. § 3553(c).

appellate courts to take a more stringent review of departures by changing the standard of review to *de novo* and requiring the Department of Justice to more aggressively challenge departures. Most important, the Act directed the Commission to tighten up the Guidelines to "ensure that the incidence of downward departures are *substantially reduced* . . . ."[103] Given this clear and recent legislative action, it is hard to understand how faithfully implementing the congressional intent could now justify varying from the Guidelines with even greater frequency on such grounds as family ties.

Ranum also concluded that it would not follow the Commission's policy statement on lack of youthful guidance.[104] The lack-of-guidance provision directs that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.[105] The lack-of-guidance provision overruled a 1991 Ninth Circuit decision – *United States v. Floyd*[106] – which had affirmed a district court's downward departure based on a mitigating circumstance it characterized as "youthful lack of guidance."[107] *Floyd* was described by one commentator as "frankly bizarre."[108] Two members of the Sentencing Commission (Judge and former Chairman William Wilkins and John Steer) – later explained why *Floyd* was uniquely singled out to be effectively overruled by the Commission:

> The strength of Commission disapproval of "lack of youthful guidance" as a basis for departure can be attributed to . . . concern that this particular label, amorphous as it is, potentially could be applied to an extremely large number of cases prosecuted in federal court, thereby permitting judges wide discretion to impose virtually any sentence they deemed appropriate (within or below the guidelines). The unwarranted disparity that could result from such a wide-open path around the guidelines was inconsistent with [Sentencing Reform Act] objections as the Commission understood them. Moreover, departures predicated on this factor could reintroduce into the sentencing equation considerations of a defendant's socioeconomic background and other personal characteristics that Congress clearly intended the guidelines to place off limits.[109]

In addition, the Commission acted only after receiving comments from around the country,

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[103] Pub. L. 108-21, Section 401(m), 117 Stat. 650, 674.

[104] *Ranum*, 2005 WL 161223, at *1.

[105] U.S.S.G. § 5H1.12 (policy statement).

[106] 945 F.2d 1096 (9th Cir. 1991).

[107] *Id*. at 1099.

[108] Michael M. Baylson, *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint*, 40 FED. B. NEWS & J. 167, 169 n.35 (1993).

[109] William W. Wilkins & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 84-85 (1993).

facilitated by a *Federal Register* notice announcing the pendency of this amendment.[110] In the wake of all this careful study and consideration underlying the youthful guidance provision, it seems remarkable to quickly and without apparent consideration of the competing concerns to broadly announce (as *Ranum* seemingly has) that the provision is fundamentally at odds with the purposes of sentencing.

These examples could be multiplied. But the general point here is that *Ranum* provides no clear reasons for treating offender characteristics differently than the "advisory" Guidelines. And the evidence in fact suggests that the Guidelines accurately reflect congressional intent concerning offender characteristics.

c. The Sentencing Commission has Significant Institutional Advantages in Assessing Offender Characteristics.

As these illustrations hopefully make clear, whether and to what extent offender characteristics should make a difference in criminal sentences is exceedingly complex. The Sentencing Commission has spent many years calibrating the Guidelines so that offender characteristics receive appropriate weight under the Guidelines. It has placed some characteristics – such as race and socioeconomic status – entirely off limits. Other characteristics (e.g., gambling addiction, lack of youthful guidance) can operate to affect a sentence, but only *within* a particular Guidelines range; they cannot justify a downward departure. Still others (e.g., family ties) are not "ordinarily relevant" for downward departures, but can justify such a departure in exceptional cases.

Without apparent analysis of the nuanced approach of the Guidelines, the history underlying these provisions, or the competing concerns involved, *Ranum* simply declares that the Guidelines' approach "cannot be squared" with the requirement that the court consider the "history and characteristics of the defendant."[111] The basis for *Ranum*'s declaration is not immediately clear. The Sentencing Commission has, of course, significant institutional advantages in determining whether use of certain factors can be squared with the purposes of punishment. Indeed, Congress commanded that the Commission make precisely this determination in drafting the Guidelines.[112] Since then, the Commission has monitored the Guidelines by collecting data on what factors courts are considering in thousands of cases around the country. The Commission also solicits public comment on proposed Guidelines changes through the *Federal Register* and holds hearings on the merits of those changes. During summer 2003, for example, as part of its complete review of departure issues, the Commission solicited

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[110] 57 FED. REG. 90-01 (proposed Jan. 2, 1992) (to be codified at U.S.S.G. § 5H1.12 (policy statement)) (requesting comment on whether Commission should amend its policy statement to provide expressly whether or not courts may consider defendant's lack of youthful guidance for departure from applicable Guidelines range)

[111] *Ranum,* 2005 WL 161223, at *1.

[112] 28 U.S.C. § 994(d).

and weighed public comment and held two public hearings to receive testimony from the Department of Justice, judges, federal defendants and prosecutors, and experts in the criminal law on downward departures.[113]

More important, the Commission and the Congress have worked closely together to insure that the Sentencing Guidelines faithfully implement the congressionally-prescribed purposes of sentencing. In recent years, Congress has made clear that its concern was not (as *Ranum* would have it) that offender characteristics are receiving too *little* attention in downward departure decisions, but rather too *much*. Thus, Congress directed – and the Commission implemented – a substantial reduction in the availability of downward departures from the otherwise-applicable Sentencing Guidelines.

In light of all these facts, I continue to believe that the Guidelines allow appropriate consideration of the history and characteristics of defendants. Therefore, I reject the argument that I should give greater consideration to offender characteristics than called for by the Guidelines. Instead, in exercising my sentencing discretion, I will give considerable weight to the recommended Guidelines sentence.

2. Considerations of Educational and Vocational Training Deserve Limited Weight.

Ranum also contends that the Sentencing Guidelines may be inconsistent with another purpose of punishment – what is sometimes loosely described as "rehabilitation." Congress has directed that in imposing sentence the courts must consider not only just punishment, deterrence, and incapacitation but also the need for a sentence "to provide the defendant with needed educational or vocation training, medical care, or other correction treatment in the most effective manner."[114] This provision, contends *Ranum*, "might conflict" with a Guidelines sentence because "[i]n some cases, a defendant's educational, treatment or medical needs may be better served by a sentence which permits the offender to remain in the community."[115]

It may be that *Ranum* is advancing the narrow claim that, in some cases, unusual medical needs or similar circumstances warrant a non-prison sentence. If so, the Guidelines already provide flexibility on this point. For example, the Guidelines provide that "extraordinary physical impairment" may be a reason for a downward departure: "in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment."[116] But some defendants have apparently read *Ranum* as advancing a far broader position, suggesting that courts should read *Ranum* as holding that rehabilitative goals can justify going

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[113] U.S. SENTENCING COMMISSION, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 18 (Oct. 2003).

[114] 18 U.S.C. § 3553(a)(1)(D).

[115] *Ranum*, 2005 WL 161223, at *2.

[116] U.S.S.G. § 5H1.3 (policy statement).

below the Guidelines sentence. These defendants concede the point made by this court in its earlier opinion – that Congress abolished parole as part of the Sentencing Reform Act.[117] But making a virtue out of a vice, these defendants argue "the lack of such [a later assessment by the parole board] makes it all the more important for the district court to make this [rehabilitative] assessment at the time of sentencing."[118]

Such claims are without merit. For the court to give significant weight to the prospect that a defendant like him might at some indeterminate point in the future rehabilitate himself would be at odds with the whole structure of the Sentencing Reform Act.[119] The impetus for the Sentencing Reform Act was the consensus that developed in the 1970s that the hoped-for rehabilitation of offenders was simply not taking place. The iconic statement of this position was Professor Robert Martinson's influential article, which succinctly concluded: "Rehabilitation, tested empirically, is a failure; 'nothing works' as a prison reform program to reduce recidivism."[120] As the Supreme Court later described it, "Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases."[121]

On the heels of such conclusions, Congress turned to crafting the Sentencing Reform Act. In 1976, Senator Edward Kennedy introduced a comprehensive bill to establish sentencing guidelines.[122] Later, Senator Orrin Hatch would join Senator Kennedy to form a formidable bipartisan, legislative team.

The legislation that ultimately became the Sentencing Reform Act specifically rested on a rejection of the rehabilitative ideal. As the Senate Judiciary Committee explained in its report on the legislation:

> Recent studies suggest that this [rehabilitative] approach has failed, and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We

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[117] *See, e.g., Wilson*, 2005 WL 78552, at *2 (citing *Booker*, 125 S.Ct. at 757).

[118] *See, e.g.,* Defendant Wilson 's Sentencing Memo. Regarding Application of *United States v. Booker* at 11, *United States v. Wilson*, Case No. 2:03-CR-00882 (D. Utah 2005).

[119] *See generally* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990) (one of the first Sentencing Commissioners helpfully outlining this history). This testimony draws heavily on Commissioner Nagel's article in describing the history.

[120] Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 1974 PUB. INTEREST, Spring 1984, at 22.

[121] *United States v. Mistretta*, 488 U.S. 361, 363 (1988) (*citing* N. MORRIS, THE FUTURE OF IMPRISONMENT 24-43 (1974); F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981)).

[122] S. 2699, 94th Cong., 2d Sess. (1976).

> know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular person has been rehabilitated.[123]

As a result of this inability to implement a rehabilitative scheme, the Congress created the Guidelines system we have today. In order to achieve greater honesty in sentencing, Congress simply abolished parole. With relatively minor exceptions, the time that the judge imposed was the time that the offender would serve.[124]

In the wake of this flat rejection of rehabilitation as a goal of sentencing, it would be surprising to find it playing a prominent part in the purposes of sentencing laid out by Congress. And the provision cited as grounds for focusing on "rehabilitation" does not use this term. Instead, it says that court should consider the need for a sentence "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[125] Given that federal prisons have extensive educational and vocational training programs as well as medical and other treatment facilities, it would be the rare case where the advisory Guidelines prison sentence would need to be ignored to provide this kind of treatment to the defendant. The Senate Report to the Sentencing Reform Act explained precisely this point:

> It is understood, of course, that if the commission finds that the primary purpose of sentencing in a particular kind of case should be deterrence or incapacitation, and that a secondary purpose should be rehabilitation, the recommended guideline sentence should be imprisonment if that is determined to be the best means of assuring such deterrence or incapacitation, notwithstanding the fact that such a sentence would not be the best means of providing rehabilitation.[126]

Courts also have great difficulty in predicting at the time of sentencing how a defendant will fare in prison and when he might become rehabilitated. A judge cannot say today whether after completing, say, 100 months of his sentence, a defendant will have rehabilitated himself to the point where he is no longer a threat to society.

Nor does the court have great confidence rehabilitation programs actually work. While it is possible that some programs might have success for some offenders,[127] it is virtually impossible for courts to have any success in identifying these offenders. The latest proof of this

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[123] S. REP. NO. 98-225, 98th Cong. 1st Sess. at 38 (1983).

[124] Hon. Stephen Breyer, Federal Sentencing Guidelines Revisited, Remarks at the Roman L, Hruska Institute, Univ. of Nebraska College of Law (Nov. 18, 1998) at 2.

[125] 18 U.S.C. § 3553(a)(1)(D).

[126] S. REP. 98-225, 1984 U.S.C.A.N. 3182, 3259 n. 288.

[127] *See e.g.*, Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979).

point came just a few weeks ago in a memorandum from the Director of Federal Bureau of Prisons reporting that the "boot camp" program would be closed.[128] Despite anecdotal evidence of their success, the National Institute of Justice recently concluded (based on a decade of research) that there was no reduction in recidivism.[129]

For all these reasons, I will, in the exercise of my discretion, reject any broad claim that I should vary from the Guidelines because of the distant prospect of rehabilitating a defendant.

3. Giving Heavy Weight to the Guidelines is the Only Way to Avoid Unwarranted Sentencing Disparity.

Ranum also appears to pay inadequate attention to the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . ."[130] This congressional command is one of the fundamental purposes underlying the Sentencing Reform Act.[131] As *Booker* explains, Congress' "basic statutory goal in enacting the Guidelines was to provide a sentencing system that diminishes sentencing disparity"[132] and "to move the sentencing system in the direction of increased uniformity."[133]

If courts were to vary from the Guidelines with any frequency, it would be impossible to achieve this congressional objective. As explained in *Wilson*:

> The only way of avoiding gross disparities in sentencing from judge-to-judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines. If each district judge follows his or her own views of "just punishment" and "adequate deterrence," the result will be a system in which prison terms will "depend on 'what the judge ate for breakfast' on the day of sentencing" and other irrelevant factors.[134]

Ranum agrees that courts should "seriously consider the Guidelines."[135] Nonetheless,

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[128] Memo. from Harley G. Lappin to all Federal Judges, Re: Intensive Confinement Center Program (Jan. 14, 2005).

[129] NAT'L INSTITUTE OF JUSTICE, CORRECTIONAL BOOT CAMPS: LESSONS FROM A DECADE OF RESEARCH (July 2003).

[130] 18 U.S.C. § 3553(a)(6).

[131] *See* S. REP. 98-225, at 38; *see also Mistretta*, 488 U.S. at 363 (1988).

[132] *Booker*, 125 S.Ct. at 760.

[133] *Id.* at 761.

[134] *Blakely v. Washington*, 124 S.Ct. 2531, 2554 (2004) (Breyer, J., dissenting). *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and Key Compromises Upon Which They Rest*, 17 HOFSTRA L.REV. 1 (1988).

[135] *Ranum*, 2005 WL 161223, at *2.

Ranum contends that courts "should not follow the old 'departure' methodology. The guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the 'heartland.'"[136] *Ranum* goes on to conclude that "courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as the ultimate sentence is reasonably and carefully supported by reasons tied to the § 3553(a) factors."[137]

I cannot agree with *Ranum*'s analysis. It is important for courts to follow the traditional departure methodology for substantive reasons. Because the departure methodology guides the exercise of discretion – both as to whether to depart and as to the extent of any departure – use of that standard methodology by courts around the country will help to minimize unwarranted sentencing disparity. On the other hand, if the *Ranum* approach is followed, different courts will surely give different weights to the broadly-worded factors listed in the Sentencing Reform Act. The result will almost inevitably be that defendants sentenced in the Eastern District of Wisconsin will serve different sentences for the same offense than similarly-situated defendants sentenced in the District of Utah. This would produce the "discordant symphony" of "excessive sentencing disparities" that the *Booker* majority stated would *not* be a consequence of its decision.[138] Or, as Judge Kopf colorfully put it, we could end up with "cafeteria style justice."[139]

Ranum concludes by asserting that "*Booker* is not . . . an invitation to do business as usual."[140] In a narrow sense, this claim is true: *Booker* does require the court to make one new inquiry. After determining the Guidelines sentence (with any appropriate departure folded in), courts must still exercise their discretion to determine whether to vary from that sentence in light of the congressionally-prescribed purposes of sentencing. But it is important that courts do "business as usual" in one respect. In recent years, unwarranted sentencing disparity arising from judicial discretion has been dramatically reduced because of the Guidelines.[141] In a country committed to equal justice under the law – with a sentencing statute that mandates similar outcomes for similar crimes committed by similar offenders – this part of the court's business must continue. The only realistic way to insure this is to generally follow the Guidelines.

III. THE COMMISSION SHOULD CHANGE THE GUIDELINES TO ENCOURAGE CLOSER ADHERENCE TO THEM.

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[136] *Id*.

[137] *Id.*

[138] *Booker*, 125 S.Ct. at 765.

[139] *Wanning*, 2005 WL 273158 at *4.

[140] *Ranum*, 2005 WL 161223, at *2.

[141] 2004 SENTENCING COMMISSION REP. ch. 5, at 140, *available at* http://www.ussc.gov/15_year/15year.htm (last visited January 31, 2005) ("the guidelines have succeeded at the job they were principally designed to do: reduce unwarranted disparity arising from differences among judges").

In its invitation, the Commission invited me to suggest changes to the Guidelines and other bodies of law that might be appropriate in the wake of *Booker*. I would like to respectfully offer seven tentative suggestions:

(A) The Commission should emphasize that certain factors (e.g., race, sex, and socio-economic status) are not to be considered when determining a sentence;

(B) The Commission should provide greater explanation for its policy statements on offender characteristics;

(C) The Commission should list cooperation with federal authorities as a forbidden factor in sentencing determinations unless the government has filed a § 5K1.1 motion;

(D) The Commission should clarify that the preponderance of the evidence standard applies to fact-finding under the Guidelines;

(E) The Commission should change all of its Policy Statements to Guidelines;

(F) The Commission should create a precise description of sentences that fall outside the Guidelines for non-approved reasons (i.e., "variances"); and

(G) The Commission should require courts to consider any relevant departures before turning to variances.

The common theme to these suggestions is that they would all encourage judge to say more closely attuned to the Guidelines.

A. The Commission Should Emphasize that Certain Factors Remain Forbidden.

As discussed above,[142] some courts have recently concluded that judges can now appropriately consider certain factors that are "forbidden" under the Guidelines. In particular, several courts have suggested that it is appropriate to rely on a defendant's socio-economic status in determining a sentence. This reasoning seems highly inappropriate and flies in the face of a clear congressional command. Therefore, the Commission should emphasize that certain factors – race, sex, national origin, creed, religion, *and* socio-economic status – remain forbidden factors.

In a policy statement, the Guidelines forbid consideration of an offender's race, sex,

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[142] *See* Part II.A, *supra* (discussing *United States v. Ranum*).

national origin, creed, religion, and socioeconomic status.[143] These prohibitions come directly from Congress. In the Sentencing Reform Act, Congress mandated "[t]he Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."[144] The reason for this clear direction is set out in the relevant legislative history. The Senate Judiciary Committee explained: "The Committee [sought] to make it *absolutely clear* that it was not . . . suggest[ing] in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence . . . ."[145] The House Judiciary Committee agreed: "If guidelines are to reduce inappropriate disparity, they must not be based on factors that reflect gender, race, religion or socioeconomic status."[146] Thus, as Congressman Feeney later explained: "The concept [behind the 1984 reforms] was clear: Justice should be the same for all, regardless of one's race, gender, status, or socio-economic background."[147]

In spite of these seemingly clear congressional commands, at least some district courts have considered these forbidden factors in their recent sentencing decisions. For example, *United States v. Ranum* specifically looked to a banker's socio-economic status in giving a lower sentence than called for the by the Guidelines.[148] *Ranum*'s consideration of forbidden socio-economic factors has been specifically endorsed by two other decisions – *United States v. Myers*[149] and *United States West.*[150] Another court has reportedly looked to a defendant's poverty as a basis for varying from the Guidelines.[151]

I urge the Commission to reemphasize that all these factors remain forbidden considerations in sentencing decisions. It is doubtful whether anyone would argue for giving longer prison terms to defendants based merely on their race, sex, national origin, or creed. Socio-economic status seems to be the one forbidden factor now under attack, as suggested by the opinions mentioned above.

Congress had compelling reasons for condemning reference to socio-economic status. The public must be confident that in something as fundamental as criminal punishment, rich and poor alike are treated fairly. To be sure, legal academics have made theoretical arguments for considering socioeconomic status when determining a sentence – although they have reached

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[143] U.S.S.G. § 5H1.10 (policy statement).

[144] 28 U.S.C. § 994(e).

[145] S. REP. 98-222, 98th Cong., 1st Sess 168 (1983) (emphasis added).

[146] H. REP. 98-1017, 98th Cong., 2d Sess 105 (1984).

[147] Hon. Tom Feeney, *Reaffirming the 1984 Sentencing Reforms*, 27 HAMLINE L. REV. 383 (Summer 2004).

[148] 2005 WL 161223, at *3-*6.

[149] 2005 WL 165314 (S.D. Iowa Jan. 26, 2005). *But see Wanning*, 2005 WL 273158 at *2 (rejecting *Myers*).

[150] 2005 WL 180930 (S.D.N.Y. Jan. 27, 2005).

[151] Testimony of AAG Christopher Wray, *supra*, at 17 (referring to California decision).

conflicting conclusions about whether this high status or low status should result in lower prison sentences. For example, well-known law and economics scholar John R. Lott has argued that high status offenders suffer greater "reputational penalties" for a conviction and therefore should receive less prison time.[152] On the other side, leftist scholars have argued that those of lower socioeconomic status deserve lighter sentences, reasoning that when society has failed to provide for adequate education, health care, and housing, an offender has no debt to society to pay.[153] But these views are the extremes. The mainstream view is represented by Congress' direction to treat rich and poor equally.

An additional reason for caution in considering socioeconomic status in sentencing decisions is the potential for racial disparities. Socioeconomic status is clearly correlated with race. For example, in a recent survey, the U.S. Census Bureau reported that the poverty rate in 2003 for white households was 8.2 percent and 24.3 percent for African-American households.[154] This is not the occasion for sorting out the contributing reasons for these racial disparities. But in light of this clear racial component, injecting socioeconomic status into sentencing decisions will effectively create racial differences.

In sum, all of the characteristics the Commission has placed on the "forbidden" list – specifically an offender's race, sex, national origin, creed, religion, *and* socioeconomic status – deserve to be there. As a result, it seems likely that Congress, if it adopts new sentencing legislation, will reassert this prohibition. The Justice Department in testimony presented to the House Subcommittee on Crime last week called for exactly such an approach: "We urge Congress, in whatever sentencing system it implements, to prohibit certain factors so that judges may not consider, in sentencing, grounds which would be improper to consider or which would create sentencing disparity based upon inappropriate characteristics of a defendant."[155]

Pending such likely congressional action, the Commission ought to do whatever it can to highlight that certain factors remain prohibited in sentencing decisions. One way to do this would be for the Commission to elevate the list of prohibited factors from its current status as a Policy Statement to a Guidelines statement. The Commission might also change the wording to make it more emphatic. The Commission might revise the statement to flatly read:

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[152] John R. Lott, *Eliminating Sentencing Guidelines Would Make Penalties More Equal*, http://www.americandaily.com/article/6751 (February 8, 2005); John R. Lott, *Optimal Penalties Versus Minimizing the Level of Crime: Does it Matter Who is Correct?*, 71 B.U. L. REV. 439, 442 (1991); *see also* Jonathan M. Karpoff & John R. Lott, *Why the Commission's Corporate Guidelines May Create Disparity*, 3 FED. SENT. RPTR. 140 (Nov. 1990).

[153] *See, e.g.*, Jeffrie Murphy, *Marxism and Retribution*, in PUNISHMENT: A PHILOSOPHY AND PUB. AFFAIRS READER 23-38 (A. John Simmons et al. eds. 1995).

[154] Press Briefing, U.S. Census Bureau, 2003 Income and Poverty Estimate from the Current Population Survey (Aug. 25, 2004), *available at* http://www.census.gov/hhes/income/income03/prs04asc.html (last visited Feb. 1, 2005).

[155] Testimony of AAG Christopher Wray, *supra*, at 17.

> Under no circumstance shall any court consider the race, sex, national origin, creed, religion, and socio-economic status of a defendant in determining a sentence.

B. The Commission Should Provide Greater Explanation for its Policy Statements on Offender Characteristics and Departures.

The Commission's policy statements on offender characteristics, departures, and (perhaps) other subjects may have received inadequate attention because the underlying rationale for those statements is unexplained. The Commission should accordingly explain the reasoning underlying these policy statements by expanding the "commentary" included with those statements.

Two illustrations may be helpful. As just mentioned, several district courts have recently concluded that socio-economic status is an appropriate consideration in sentencing. In doing so, they have rejected the restrictions found in § 5H1.10 of the Guidelines. These courts have seemingly been unaware of the congressional mandate underlying this prohibition,[156] as they have not cited that mandate in their opinions. In fairness to these courts, the Commission did not make them aware of the prohibition. It would therefore be appropriate for the Commission to include, as commentary to § 5H1.10, something like the following statement:

> This prohibition is based on a congressional command. *See* 28 U.S.C. § 994(e).

A second illustration of the need for greater explanation comes from the Commission's policy statement of lack of youthful guidance. The lack-of-guidance provision directs that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted."[157] Since *Booker*, some courts have rejected this policy statement.[158]

The Sentencing Guidelines manual provides little help on determining why to follow the policy statement. The restriction is simply announced with no supporting reasoning. Yet, on careful investigation, it turns out that ample reason supports the Commission's conclusion. The lack-of-guidance provision overruled a 1991 Ninth Circuit decision – *United States v. Floyd*[159] – which had affirmed a district court's downward departure based on a mitigating circumstance it characterized as "youthful lack of guidance."[160] Two members of the Sentencing Commission (Judge and former Chairman William Wilkins and John Steer) later wrote in a law review article why *Floyd* was uniquely singled out to be effectively overruled by the Commission:

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[156] *See* Part II.B.2, *supra*.
[157] U.S.S.G. § 5H1.12 (policy statement).
[158] *Ranum*, 2005 WL 161223, at *1.
[159] 945 F.2d 1096 (9th Cir. 1991).
[160] *Id*. at 1099.

> The strength of Commission disapproval of "lack of youthful guidance" as a basis for departure can be attributed to a number of factors. Among them was a concern that this particular label, amorphous as it is, potentially could be applied to an extremely large number of cases prosecuted in federal court, thereby permitting judges wide discretion to impose virtually any sentence they deemed appropriate (within or below the guidelines). The unwarranted disparity that could result from such a wide-open path around the guidelines was inconsistent with [Sentencing Reform Act] objections as the Commission understood them. Moreover, departures predicated on this factor could reintroduce into the sentencing equation considerations of a defendant's socioeconomic background and other personal characteristics that Congress clearly intended the guidelines to place off limits.[161]

This reasoning seems quite powerful. Indeed, in *Wilson II*, I decided to follow it rather than the competing approach articulated by other courts.[162] Yet a judge investigating this subject should not have to track down a law review article written by members of the Commission to divine the Commission's rationale. That rationale should be clearly explained in the Commentary. Accordingly, I recommend that a commentary section be added to § 5H1.12 that tracks the comments made by Judge Wilkins and Commissioner Steer.

These illustrations could be multiplied. But the basic point remains that the Commission should provide greater justification for its policy statements on offender characteristics and on departures. Accordingly, I propose that the Commission expand its commentary for each of the provisions contained in Chapter 5H and 5K to specifically explain the Commission's underlying basis for its conclusions. This will permit sentencing judges to apply that rationale in individual sentencing cases.

The only objection I have heard to such an idea is that it might lead to Commissioners on the Commission being subpoenaed to testify in sentencing proceedings. This concern seems far-fetched. The Commission is a judicial branch agency. Other members of the judiciary are not subpoenaed, even where an interpretation of one of their opinions is at issue in a case. Nor have members of Congress or the Executive Branch been regularly subpoenaed. Indeed, if anything, for Commissioners to *fail* disclose their reasoning would seem to present a greater risk of facing a subpoena.[163] When the Commission's reasoning is fully transparent in the Guidelines manual,

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[161] William W. Wilkins & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 84-85 (1993).

[162] *See Wilson II*, *supra*, at **xxxxxx.**

[163] *Cf.* Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heat(land): The Long Search fo Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723 (1999) (criticizing Commission for not better explaining what constitutes the heartland of various offenses). My criticism is far more limited than Miller and Wright's. I mean only to suggest that the Commission should explain the reasoning behind the specific policy statements contained in chapters 5H and 5K.

there is no need to resort to other devices to learn it.

C. The Commission Should List Cooperation with Federal Authorities as a Forbidden Factor in Sentencing Determinations Unless the Government Has Filed a § 5K1.1 Motion.

Booker may have jeopardized the requirement that the government file a motion for a downward departure before a court can impose a lower-than-Guideline sentence. The Commission should take steps to insure that a government motion is a prerequisite for such a lower sentence, specifically by adding a new forbidden factor to sentencing considerations: cooperation with federal authorities in the absence of a government motion.[164]

Before *Booker*, it was clear that a government motion was required for a court to depart downward. The Supreme Court clearly announced this result in *Wade v. United States.*[165] *Wade* described as "clearly correct" the view that the U.S.S.G. § 5K1.1 "imposes the condition of a Government motion upon the district court's authority to depart . . . ."[166] Constitutional challenges to this requirement have also been consistently rejected.[167]

In the wake of *Booker*, it is arguable that such a requirement no longer exists. After all, if the entire Guidelines system is "advisory," it is hard to understand how a particular component – § 5K1.1 – is mandatory. Several commentators have advanced this position.[168] To be sure, in some circumstances, mandatory minimum sentences remain in place, and a government motion for downward departure would still appear to be required for cooperation to open the door to a lower-than-the-mandatory sentence.[169] But in a number of other situations, the Guidelines provision alone will govern.

The Department of Justice has argued that this situation imperils its ability to obtain vital cooperation from defendants in narcotics and other serious cases. Last week, Assistant Attorney General Christopher Wray testified before Congress about the need to control substantial assistance motions:

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[164] I acknowledge interesting discussions with Professor Stephen Saltzburg as the source of this idea. I am not certain whether he would endorse this proposal; he can, of course, speak for himself in his testimony on Wednesday.

[165] 504 U.S. 181 (1992).

[166] *Id.* at 183.

[167] *See, e.g., United States v. LaGuardia*, 902 F.2d 101010 (1st Cir. 1990) (rejecting argument that § 5K1.1 eliminates or interferes with a sentencing court's right to employ judicial discretion in individualized sentencing). *See generally* ROGER W. HAINES, JR., ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 1550-51 (Nov. 2004).

[168] *See, e.g., Balance of Power: High Court Declares Guidelines on Sentencing Violate Rights*, WALL ST. J., Jan. 13, 2005, at A1 (citing Prof. Frank Bowman).

[169] *See* 18 U.S.C. § 3553(e).

> In a number of circumstances, there will be less of an incentive for cooperating defendants to assume the risks of cooperation if they can seek sentencing benefits without risk. The implications of the status quo [after *Booker*] are particularly troubling for the Department in those cases in which defendants and targets are not charged with an offense involving a mandatory minimum sentence. This will have grave effects on the Department's ability to prosecute a wide variety of crimes which are difficult, if not impossible, to investigate without cooperators, such as drug trafficking, gangs, corporate fraud and terrorism offenses. Moreover, it may impair the Department's ability to obtain timely information. If defendants or targets of an investigation believe a district judge will impose minimal punishment or reward the defendant's representations regarding his cooperation and its value, defendants may defer attempts to cooperate with the Department. This could have a very disruptive effect on on-going investigations.[170]

While it is possible to argue that the Department is simply defending its "turf," there are several reasons for crediting its position. As Professor Frank Bowman cogently explained before the *Booker* decision, "The severity and certainty of Guidelines sentences provide the initial impetus for witness cooperation, but it is the government monopoly on the substantial assistance motion that ensures candor, completeness, and continued cooperation until the job is done."[171]

Moreover, while judges are well suited to evaluate most sentencing factors, it is difficult to see any comparative advantage for the judiciary in evaluating witness cooperation with prosecutors. As much as I would like to argue that judges (like me) can do a better job here, prosecutors are the ones who actually work closely with a cooperating individual to develop leads and prepare testimony. As Professor Bowman has noted, "the prosecutor, who knows the case better than anyone . . . has both the knowledge and incentive to detect lies, half-truths, and incomplete disclosure . . . . [U]nder a substantial assistance system in which the prosecutor is stripped of the doorkeeper function, the incentive to cooperate some would remain, but the imperative of complete and candid cooperation would be dramatically diminished."[172]

For all these reasons, the Commission should take steps to restore the prosecutor's doorkeeping function on substantial assistance motions to its pre-*Booker* form. The Commission could move in this direction by specifically listing substantial assistant without a government motion as a forbidden ground for departing from the Guidelines. That provision should also contain extensive commentary explaining the Commission's reason for its decision.

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[170] Testimony of AAG Wray, *supra*, at 16.

[171] Frank O. Bowman, III, *Departing is Such Sweet Sorrow: A Year of Judical Revolt on "Substantial* Assistance*" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 55 (1999).

[172] *Id.* at 56.

D. The Commission Should Clarify that the Preponderance of the Evidence Standard Applies to Fact-Finding Under the Guidelines.

Before *Booker*, the standard of proof for sentencing determinations under the Guidelines was generally proof by a preponderance of the evidence.[173] In the wake of *Booker*, preponderance of the evidence fact-finding remains appropriate. Nonetheless, there have been a few judicial opinions and academic commentators who contend that *Booker* requires a higher standard of proof for sentencing determinations. To eliminate confusion on this point, the Commission should make clear that the preponderance of the evidence standard applies to fact-finding under the Guidelines.

Booker, of course, requires the court to "consult" the Guidelines in determining a sentence. As part of that consultation process, then, *Booker* requires the real offense be determined through judicial fact-finding under the traditional preponderance of the evidence standard. Because this conclusion has since been disputed by several courts[174] and commentators,[175] it is appropriate to briefly explicate this point. *Booker*'s "remedial majority" (that is, the portion of the majority opinion authored by Justice Breyer) carefully considered whether to engraft onto the Guidelines the constitutional requirements of the Sixth Amendment – jury determinations and proof beyond a reasonable doubt. The remedial majority flatly rejected any such remedy, concluding it "would destroy the system":

> To engraft the Court's constitutional requirement onto the sentencing statutes . . . would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.[176]

To avoid "destroying the system," the remedial majority severed only the two provisions in the Sentencing Reform Act that rendered the Guidelines mandatory,[177] concluding that with these provisions gone "the remainder of the Act satisfies the Court's constitutional requirements."[178]

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[173] *See, e.g., United States v. Lowden*, 955 F.2d 128 (1st Cir. 1992); *United States v. Sanders*, 990 F.2d 582 (10th Cir. 1993). *See generally* ROGER W. HAINES, JR., ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 1743-46 (Nov. 2004).

[174] *See, e.g., Huerta-Rodriguez*, 2005 WL 318640; *see also United States v. Barkley*, Case No. 04-CR-119 (N.D.Okla. Jan. 24, 2005).

[175] *See, e.g.*, Prof. Doug Berman's Sentencing Blog (Jan. 30, 2005) (reviewing arguments by Steve Sady).

[176] *Booker*, 125 S.Ct. at 760.

[177] *Id.* at 765 (invalidating 18 U.S.C. § 3553(b)(1) and § 33742(e)).

[178] *Id.*

Courts are now obligated to follow the holding of the "remedial majority" in *Booker* and give effect to its conclusion that "the remainder of the Act" remains in place. Therefore, courts must determine the advisory Guidelines range in the way that they always have.

The way that most courts made Guidelines determinations before *Booker* was with a preponderance of the evidence standard. For example, the Second Circuit,[179] the Sixth Circuit,[180] and the Tenth Circuit had all explicitly affirmed this standard.[181] Moreover, the Commission had clearly articulated its view on the subject of fact-finding under the Guidelines. In commentary to a policy statement, the Commission has identified a preponderance of the evidence standard as appropriate: "The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."[182]

The Commission's clear articulation of the preponderance standard is muted by its placement in mere *commentary* to a policy statement. Perhaps such an understated approach could be justified before the Supreme Court had clearly spoken on the issue. But now that *Booker* has rendered the Guidelines advisory, understatement is unnecessary. Advisory guidelines can constitutionally rely on a preponderance of the evidence standard because a defendant has no right to have "advice" calculated in any particular fashion. The Commission should move its statement about the preponderance of the evidence standard up to a clear Guideline. This issue is important to district judges working through the implications of *Booker*. The Commission's thoughts on the subject should be clearly expressed.

E. The Commission Should Change All of Its Policy Statements to Guidelines.

Many of the Commission's most important provisions are embodied in various "policy statements" in the Guidelines manual rather than in the Guidelines themselves. Before *Booker*, this approach may have made some sense to distinguish between mandatory and discretionary situations. Now, however, since the entire Guidelines system is discretionary, retaining this distinction makes little sense and may be the source of confusion. Accordingly, the Commission should redesignate many of its policy statements as Guidelines, particularly those found in the departure section (section 5K) and the offender characteristics section (section 5H).

Before *Booker*, it was clear that the policy statements bound district courts. In *United States v. Stinson*,[183] the Supreme Court stated that "[t]he principle that the Guidelines Manual is

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[179] *United States v. Cordoba-Murgas*, 233 F.3d 704, 708-09 (2d Cir. 2000).

[180] *United States v. Mayle*, 34 F.3d 552 (6th Cir. 2003).

[181] *United States v. Valdez*, 225 F.3d 1137, 1143 n.2 (10th Cir. 2000). *But see, e.g.*, *United States v. Kikumura*, 918 F.2d 1084, 1101 (3rd Cir. 1990).

[182] Comment., U.S.S.G. § 6A1.3 (policy statement).

[183] 508 U.S. 36 (1993).

binding on federal courts applies as well to policy statements."[184] The Commission itself took the same view.[185] Of course, some policy statements were themselves written in non-binding terms. Thus, when a policy statement provided that certain things should "ordinarily" be done, that did not bar a court from finding an unusual situation calling for different action.[186] But in general, policy statements and Guidelines were both mandatory.

In light of the fact that policy statements and Guidelines statements were both binding, it is not immediately obvious why the Commission chose to use both kinds of statements. Some commentators have suggested that policy statements were used to show the "discretionary character" of certain kinds of decisions, such as departure decisions.[187] If that is the justification, it has evaporated. All of the Guidelines are now of a discretionary character, since the entire Guidelines apparatus has been rendered "advisory" by *Booker*. Accordingly, the Commission should redesignate the policy statements as Guidelines to avoid confusion.

F. The Commission Should Endorse "Departure" vs. "Variance" Nomenclature.

In the wake of *Booker*, it is clear that courts can end up imposing a sentence different from that called for by the Guidelines in two different ways. First, a court can find that a "departure" is appropriate for reasons approved by the Commission. Second, a court can go outside the Guidelines for reasons not approved by the Commission.

These two situations can be clearly distinguished. The first involves departing from the Guidelines in unusual cases for Commission-approved reasons. The Guidelines provide generally for "departures" where "there exists an aggravating or mitigating circumstance . . . of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines . . . ."[188] The Guidelines also provide for departures in specified unusual circumstances, such as when a defendant engages in extreme conduct[189] or suffers from diminished capacity.[190] Under these departure provisions, a sentence for an unusual case can comply with the Guidelines system even though it is outside the Guidelines range.

The second situation involves a court rejecting the sentencing recommended by the Guidelines. An illustration of this situation comes from *United States v. Ranum*. *Ranum*

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[184] *Id.* at 42.

[185] U.S.S.G. § 1B1.7, Comment.

[186] *See, e.g., United States v. Goings*, 200 F.2d 539, 543 (8th Cir. 2000) (policy statements are binding only if they interpret a guideline or prohibit district courts from taking a specified action).

[187] *See* ROGER W. HAINES, JR., ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 1544 (Nov. 2004).

[188] U.S.S.G. § 5K2.0

[189] U.S.S.G. § 5K2.8.

[190] U.S.S.G. § 5K2.13.

imposed a sentence significantly lower than the Guidelines' sentence for various reasons not endorsed by the Guidelines. For example, *Ranum* relied on the socio-economic status of the banker defendant as a reason a for lower-than-Guidelines sentence.

Keeping things straight will be made easier with a standardized vocabulary to describe different kinds of court actions. To avoid confusion, I recommend using the term "departure" as reflecting its settled meaning of a difference from an otherwise-specified Guidelines sentence approved by the Guidelines themselves,[191] and a new term – perhaps "variance" – as meaning a difference from the Guidelines system that is not called for by the Guidelines themselves. The Second Circuit has suggested the term "non-Guidelines sentence" might serve as the distinguishing term from "departure."[192] Reportedly, the defense bar is partial to "statutory sentence."[193] But these awkward terms still leave a void in that no verb is available to describe a court's action in such circumstances. "Variance" has the advantage of including the verb form "vary." Judge Kopf has suggested "deviate,"[194] but that risks confusion with the similar-sounding "deviant." I think "variance" works best.

Whatever term is ultimately selected, however, is less important than actually selecting a particular, unique term and then requiring courts to provide the Sentencing Commission with reports that clearly reflect what has happened. Only in this way will the Commission, Congress, and the public have sufficient information to evaluate the post-*Booker* world.

G. The Commission Should Require Courts to Consider Any Relevant Departure Before Turning to Variances.

Some courts have suggested that it is no longer necessary to actually follow the departure methodology listed in the Guidelines. For example, *Ranum* saw no need for courts to

> follow the old "departure" methodology. The guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside the 'heartland.' Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines, so long as . . . the ultimate sentence is reasonably and carefully supported by reasons tied to the § 3553(a) factors.[195]

This view seems incorrect. *Booker* commands that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when

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[191] *See* U.S.S.G., Chapter 5, Part K ("Departures").

[192] *United States v. Crosby*, 2005 WL 204916, *5 n. 9 (2d Cir. Feb. 2, 2005).

[193] Doug Berman's Sentencing Blog, http://sentencing.typepad.com (last visited Feb. 13, 2005).

[194] *Wanning*, 2005 WL 273158 at *5.

[195] *Ranum*, 2005 WL 161223, at *2.

sentencing."[196] Departure provisions are, of course, part of "the Guidelines" that the court must take "into account" when imposing sentence. Unless the court calculates and then considers what the Guidelines advise as to a particular sentence in a particular case – that is, the initial Guidelines sentence adjusted by any applicable departures – the court is not in a position to follow *Booker*'s requirements. The Second Circuit recently reached this conclusion, holding that district judges should decide whether to impose a sentence "within the applicable Guidelines range *or within permissible departure authority*," as opposed to a non-Guidelines sentence.[197] As the Circuit explained, a "'departure' [is] not a sentence within the applicable Guidelines range, but it [is] nonetheless a 'Guidelines sentence,' *i.e.*, imposed pursuant to the departure provisions of the policy statements in the Guidelines, as well as the departure authority of subsection 3553(b)(1)."[198] Likewise, Judge Kopf explained: "[M]ost cases that truly warrant a sentence different from that called for by the otherwise applicable Guideline ranges can be accommodated by using normal departure theory. We can and should apply that time-tested approach when we believe that the Guideline ranges are too harsh or too lenient."[199]

An illustration may serve to demonstrate how departures are an integral part of the Guidelines structure. Consider a case in which a war veteran illegally possessed a machine gun as a trophy of war. It is essentially meaningless to learn that the Guidelines range for this offense is 27-33 months[200] without also taking into account the fact that the Guidelines themselves specifically suggest a downward departure for "lesser harms" on such facts.[201] Moreover, the Guidelines themselves create a basis for determining the extent of any departure. As Judge Easterbrook explained in a leading pre-*Booker* opinion, "[I]t is possible to formulate approaches that link the extent of departure to the structure of the guidelines."[202] With regard to the extent of the departure for the war veteran, for example, the Guidelines create a downward adjustment for possessing an illegal firearm for "collection purposes." Although not directly applicable to the offense of possessing a machine gun,[203] this adjustment might provide a reasonable analogy for the extent of such a downward departure.[204] Whatever the appropriate extent of the departure, however, until a court first determines how far the Guidelines themselves recommend as a departure, it is not in a position to "consider" the sentence that the Guidelines recommend.

Following the "old departure methodology" is also important for purposes of allowing

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[196] *Booker*, 125 S.Ct. at 767.

[197] *United States v. Crosby*, 2005 WL 240916, at *7 (emphasis added).

[198] *Id.* at 19 n.9.

[199] *Wanning*, 2005 WL 273158 at *4-5.

[200] U.S.S.G. § 2K2.1(a)(5) (prohibited weapon is a level-18 offense).

[201] *See* U.S.S.G. § 5K2.11 (policy statement).

[202] *United States v. Ferra*, 900 F.2d 1057, 1062 (7th Cir. 1990).

[203] *See* U.S.S.G. § 2K2.1(b)(2) (reduction not applicable for a restricted weapons offense).

[204] U.S.S.G. § 2K2.1(b)(2).

both the Sentencing Commission and the Congress to monitor how the new system is working. It was for this very reason, among others, that the PROTECT Act required courts to specifically state in writing their reasons for issuing a sentence outside the Guidelines range.[205] Congress will understandably still be quite interested in learning how often sentences under the post-*Booker* regime fall within or outside of the Guidelines, and for what reason.[206] In the wake of *Booker*, some commentators have urged Congress to act quickly to prevent judicial leniency and disparity from developing under the now-advisory Guidelines system.[207] Determining whether such concerns are valid requires a hard-headed look at the data on judicial reaction to *Booker*. Unless a district court is clear about how it arrived at a sentence – "showing its work" as one respected commentator colorfully put it[208] – that data collection process will be aborted.

For all these reasons, the Commission should require courts to always consider whether a departure is appropriate before considering a possible variance from the Guidelines. Courts should also be required to indicate when they are following the Guidelines, when they are departing from the Guidelines, and when they are varying from the Guidelines.

IV. THE COMMISSION SHOULD REVISE THE GUIDELINES TO ALLOW VICTIM PARTICIPATION IN GUIDELINES DETERMINATIONS AS REQUIRED BY RECENT CRIME VICTIMS LEGISLATION.

The Commission should change the procedural provisions of the Guidelines to allow participation by crime victims. Currently those provisions allow only "the parties" (i.e., the prosecution and the defense) to dispute sentencing factors contained in the pre-sentence report. Last year, Congress passed a new law guaranteeing victims participation in all aspects of the criminal justice system. In light of that law, the Guidelines provisions should be expanded to include victims.

Last October, Congress passed the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act," as codified in Title 18 U.S.C. § 3771.[209] I understand that Scott Campbell's mother – Collene (Thompson) Campbell – will testify later this afternoon before the Commission. One particular provision in the Act is worth highlighting here because of its effects on Guidelines procedures. (Also, because the new legislation is not widely known, a full copy of the Act is included as an attachment to this

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[205] 18 U.S.C. § 3553(c)(2).

[206] *See* Memorandum from Richardo H. Hinojosa, Chair, U.S. Sentencing Comm'n, and Sim Lake, Chair, Criminal Law Committee of the Judicial Conference of the U.S., Regarding Documentation Required to be Sent to the Sentencing Comm'n (Jan. 21, 2005).

[207] *See, e.g.,* Testimony of Daniel P. Collins before the House Judiciary comm. Subcomm. On Crime (Feb. 10, 2005).

[208] http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/always_remember.html.

[209] PUB.L. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 226.

testimony.)

Among its comprehensive list of rights, the Crime Victims' Rights Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . . ."[210] This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court.[211] However, the right is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The victim's right to be "reasonably heard" appears to include a right for the victim to speak to disputed Guidelines issues. As Senator (and co-sponsor) Jon Kyl explained, the right includes sentencing recommendations:

> When a victim invokes this right during plea and sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and *sentencing recommendations*.[212]

A "sentencing recommendation" may well implicate Guidelines issues, particulary where a court gives heavy weight (as I do) to the Guidelines calculation. Moreover, the Congress intended the right to be construed broadly. Again, as Senator Kyl explained:

> In short, the victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused.[213]

Finally, the natural reading of a right to be "reasonably heard" is a right to be heard at a time when that statement might make a difference. "As long ago as 1914, the [Supreme] Court emphasized that' the fundamental requisite of due process of law is the opportunity to be heard.'"[214] "It is equally fundamental that the right to . . . an opportunity to be heard 'must be

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[210] 18 U.S.C. § 3771(a)(4).

[211] *See generally* DOUGLAS BELOOF, PAUL CASSELL & STEPHEN TWIST, VICTIMS IN CRIMINAL PROCEDURE chapt. 10 (2d ed. 2005 forthcoming) (discussing victim impact statmeents); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395-96 (same).

[212] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added). *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 10 (discussing three types of victim impact information).

[213] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

[214] *Davis v. Scherer*, 468 U.S. 183, 200 (1984) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

granted at a meaningful time and in a meaningful manner.'" [215]

A victim's right to be heard regarding sentencing issues is important for another reason: insuring proper restitution. Federal law guarantees most victims of serious crimes the right to restitution.[216] Reinforcing those laws, the new Crime Victims Rights Act also guarantees that victims have "[t]he right to full and timely restitution as provided in law."[217] As a practical matter, many of the calculations undergirding an award of restitution will rest on information contained in the pre-sentence report. While the restitution statutes have their own detailed procedural provisions,[218] it is unclear how those provisions are integrated with the Guidelines procedural provisions. For all these reasons, the Rights of Crime Victims' Act should be understood as giving victims the right to be heard *before* a court makes any final conclusions about Guidelines calculations and other sentencing matters.

Because the Act gives victims a right to be heard on Guidelines issues, the Commission should revise the Chapter 6 sentencing procedures. Currently, those procedures fail to leave any room for victim participation – permitting only the parties (the government and the defense) to be involved in the process. For example, section § 6A1.3 provides: "When any factor important to the sentencing determination is reasonably in dispute, *the parties* shall be given an adequate opportunity to present information to the court regarding that factor."[219] In light of the new Act, victims should likewise be given an opportunity to present information on a disputed sentencing factor.

Victims may often possess information quite relevant to the district court's assessment of the Guidelines range. The Guidelines themselves contain an entire part devoted to "victim-related adjustments."[220] This part requires the court to make such determinations as whether a defendant selected his victim because of race, whether a defendant should have known that a victim was vulnerable, and whether a victim was physically restrained during the course of an offense. In addition, other Guidelines look to victim-related characteristics. The kidnaping provision, for example, looks to such things as the degree of injury suffered by the victim.[221] The fraud provision looks to loss to the victim.[222]

To be sure, in many cases a prosecutor may bring some of these relevant facts to the

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[215] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[216] *See* 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); *see also* 18 U.S.C. § 3663 (Victim Witness Protection Act).

[217] 18 U.S.C. § 3771(a)(6).

[218] 18 U.S.C. § 3664.

[219] U.S.S.G. § 6A1.3(a) (emphasis added).

[220] U.S.S.G. § 3A.1.1 *et seq.*

[221] U.S.S.G. § 2A4.1(b)(2).

[222] U.S.S.G. § 2B1.1(b).

court's attention. Indeed, under the new Act prosecutors are required to "use their best efforts" to insure that victims' rights are protected.[223] But the Act clearly indicates that the prosecutor's representations are not a substitute for the victim's personal right to be reasonably heard. Thus, the Act begins: "A *crime victim* has the following rights . . . ."[224] Moreover, the Act specifically provides that victims can "assert the rights" provided in the statute both before the district court and on appeal by way of expedited mandamus relief.[225] This demonstrates that Congress intended victims to be involved in sentencing proceedings as the functional equivalent of parties, that is, as equal participants in the process.[226] As Senator Kyl explained about the right-to-be-heard provision:

> This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an *independent participant in the proceedings*.[227]

In light of the new Act, the Commission should revise its Guidelines to clarify that both the parties *and* any victim have the right to be heard on Guidelines issues, including issues relating to restitution. These changes can be easily accomplished with only three modest changes to the Guidelines:

First, a new section (6A1.2(d)) should be added regarding disclosure of pre-sentence reports:

> The attorney for the government shall communicate the relevant contents of the pre-sentence report, including information about the impact of the offense on the victim and about restitution to the victim in the case.

Second, a new section (6A1.3(c)) should be added regarding opportunity for victims to dispute sentencing:

> The attorney for the government shall advise the court of any relevant sentencing factors that are disputed by the victim in the case, including facts about the impact of the offense on the victims and about restitution. The court

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[223] 18 U.S.C. § 3771(c).

[224] 18 U.S.C. § 3771(a).

[225] 18 U.S.C. § 3771(d).

[226] *See generally* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289 (explaining victim participation model of criminal justice).

[227] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

> shall give the victim an opportunity to be heard on these subjects before resolving any such disputed sentencing factors.

Third, section 6A1.4 should be amended by adding the following underlined language:

> Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's rehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The prosecutor shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

With these changes, the Guidelines will implement Congress' intent that victims have an opportunity to be reasonably heard in sentencing proceedings. It is also appropriate to have prosecutors assist victims on these issues. The Crime Victims Rights Act requires government attorneys to "make their best efforts to see that crime victims are notified of, and accorded, the[ir] rights . . . ."[228] More important, the Act gives victims "[t]he reasonable right to confer with the attorney for the Government in the case."[229] This means that victims will be regularly conferring with prosecutors about sentencing matters. As Senator Kyl explained:

> [T]he victim has a reasonable right to confer with the attorney for the government in the case. This right is intended to be expansive. For example, the victim has the right to confer with the government concerning any critical stage or disposition of the case. . . . Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government's attorney about proceedings after charging.[230]

For all these reasons, the Guidelines should be changed to guarantee crime victims participation as required by the Crime Victims Rights Act. Other bodies of law may also need modification to reflect the new Act. For example, it seems likely that the Act will require significant changes in the Federal Rules of Criminal Procedure. I am currently in the process of preparing suggestions for the Advisory Committee on Rules of Criminal Procedure as to how this might be accomplished. But the need for changes elsewhere in the system provides no justification for delaying appropriate changes to the Guidelines. The Guidelines should be changed to give victims their right to participate in the Guidelines process.

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[228] 18 U.S.C. § 3771(c)(1).
[229] 18 U.S.C. § 3771(a)(5).
[230] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

CONCLUSION

In concluding my (perhaps too lengthy) testimony, one last point may deserve brief mention. Most of the changes I propose may act to solidify the Guidelines and caution against more lenient punishments. This is entirely appropriate. The Guidelines have the backing of the public. According to sophisticated public opinion polling, "there is a fair amount of agreement between sentences prescribed in the guidelines and those desired by the members of the [public]."[231] Convergence between the Guidelines and the public is not surprising. For nearly two decades, in an on-going dialogue with the Sentencing Commission, Congress has repeatedly reaffirmed its view that the Guidelines are not overly severe. Indeed, as demonstrated by the PROTECT Act's recent significant restrictions on downward departures, Congress, if anything, takes the opposite view.

The decision about how harshly to punish crime in this country is a matter of legislative prerogative. As *Booker* plainly held: "The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[232] However unhappy some may be with that allocation of power, that is the allocation our democratic system has created.

Yet paradoxically, *Booker* presents the judiciary with an opportunity to assume a greater role in sentencing decisions. For many years, judges have sought greater freedom from the Guidelines strictures.[233] Those judicial pleas were accompanied by assurances that judges would use any newly-granted freedom responsibly. Now, as a result of shifting majorities in the *Booker* decision, a less rigid system of advisory Guidelines has been put in place – at least temporarily. The judiciary thus has the chance to demonstrate to Congress that it can be trusted with greater freedom – that it will responsibly exercise any discretion not to thwart congressional objectives, but to implement them discriminatingly in particular cases.

Should the courts fail to carry out congressional will, there should be little doubt what will follow. Congress can easily implement its desired level of punitiveness in the criminal justice system, through such blunderbuss devices as mandatory minimum sentences. It is far better, then, for courts to exercise their discretion to insure that Congress' intention is implemented through close adherence to the congressionally-approved Guidelines system, with only rare exceptions for unusual situations. I encourage the Commission to do whatever it can to

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[231] *Wilson*, 2005 WL 78552 at *5 (citing PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997)). Mandatory minimum sentences are, at least in some situations, out of step with public views. *See United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004) (55-year mandatory minimum sentence called for by federal law, more than recommended by the jury or by any other state).

[232] *Booker*,125 S.Ct. at 768.

[233] *See, e.g.*, Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998).

encourage judges to generally follow the Guidelines.

TEXT OF 18 U.S.C. § 3771 - THE NEW CRIME VICTIMS ACT

(a) Rights of crime victims.--A crime victim has the following rights:
(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
(5) The reasonable right to confer with the attorney for the Government in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded.--In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(c) Best efforts to accord rights.--
(1) Government.--Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).
(2) Advice of attorney.--The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).
(3) Notice.--Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.
(d) Enforcement and limitations.--
(1) Rights.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.
(2) Multiple crime victims.--In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.
(3) Motion for relief and writ of mandamus.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the

district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.
(4) Error.--In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.
(5) Limitation on relief.--In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if--
(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;
(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and
(C) in the case of a plea, the accused has not pled to the highest offense charged.
This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.
(6) No cause of action.--Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions.--For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) Procedures to promote compliance.--
(1) Regulations.--Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.
(2) Contents.--The regulations promulgated under paragraph (1) shall--
(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;
(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;
(C) contain disciplinary sanctions, including suspension or termination from employment, for

employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.