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PROSECUTORIAL DISCRETION IN THE SHADOW OF ADVISORY GUIDELINES AND MANDATORY MINIMUMS

by MICHAEL A. SIMONS*

INTRODUCTION

Imagine the following rather run-of-the-mill crime spree:

Three young men, ranging in age from eighteen to twenty and without significant criminal histories, get together to rob a convenience store in New York City. They take an unloaded and inoperable gun, go into the store, point the gun at the clerk behind the counter, and take a few hundred dollars from the cash register. Flush with success, they decide to do it again, this time at a jewelry store down the block. One of the young men points the unloaded gun at the store employees, another stands guard by the door, and the third jumps over the counter and grabs as many jewels as he can. Their total take is approximately \$20,000. Realizing that they cannot continue to rob stores on the same block without getting caught, they branch out and rob a jewelry store in New Jersey, another Connecticut, and a third in Massachusetts, using the same pattern. After the fifth robbery, they are caught.¹

What sentences would these three young men get for committing five robberies in four different states using an inoperable gun? And what would the federal prosecutor's role be in determining a just sentence? The answer to these questions would depend on when the robberies were committed.

In the decades before the United States Sentencing Guidelines went into effect in 1987, the sentencing judge would have had almost unfettered discretion to individualize sentences for our three defendants. Although the prosecutor had the power to decide which charges to bring, the charging decision set only the broadest parameters for the sentence, giving prosecutors little incentive to reflect on the justice of possible sentencing.²

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1. Although the facts have been simplified, this hypothetical is based on a case I prosecuted in the mid-1990s as an Assistant U.S. Attorney in the Southern District of New York.

2. Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 *GEO.*

After the mandatory Sentencing Guidelines took effect in 1987 and drastically circumscribed judicial discretion in sentencing, the prosecutor's role became much more important. That role, however, was essentially restricted to calculating the sentence as determined by the Guidelines' rigid mathematical formulas.³ Like the sentencing system that preceded it, the mandatory Guidelines system minimized the impact of prosecutors' charging decisions on the ultimate sentence and thereby similarly discouraged prosecutorial engagement with sentencing justice and the purposes of punishment.⁴

In theory, this prosecutorial disengagement from the principles of punishment should not have been particularly troubling. Sentencing justice should have been achieved by combining the policy decisions of the Sentencing Commission with the factual determinations of the sentencing judge.⁵ The theory, however, ignores the realities of plea bargaining and mandatory sentences, which shifted enormous sentencing authority to prosecutors.⁶ In the case of our three robbers from New York City, the prosecutor, by deciding to include sentencing enhancements for carrying a firearm, could add an additional 7, 32, 57, 82, or 107 years to their sentences.⁷ In that environment, prosecutorial disengagement from sentencing justice is both misguided and false: misguided because prosecutors have an important institutional role to play in determining sentences,⁸ and false because prosecutors inevitably do exercise discretion over sentences, though they often do so in indirect—or even surreptitious—ways.⁹

MASON L. REV. 303, 304-05 (2009).

3. See, e.g., U.S. SENT'G COMM'N, GUIDELINES MANUAL [hereinafter GUIDELINES MANUAL], § 1B1.1 (Nov. 2009) (explaining the application of the Guidelines provisions, including the calculation in the form of levels of the base offense, mitigating factors, and aggravating factors). The calculation of the relevant levels of the offense produces the sentencing requirements. *Id.*

4. Simons, *supra* note 2, at 305.

5. *Id.* at 305-06. For example, if an offender threatened to assault a ten-year old child with a knife and injured the child, the judge would apply Section 2A2.3 of the Guidelines. GUIDELINES MANUAL § 2A2.3. Under that section, the Base Offense Level for a minor assault in which a dangerous weapon was possessed and its use threatened is seven. Applying the Specific Offense Characteristics in Section 2A2.3(b), the judge would then increase the sentence by four levels if the judge found that there was substantial bodily injury to a child under sixteen years of age. *Id.* § 2A2.3(b).

6. Simons, *supra* note 2, at 305-06.

7. See 18 U.S.C. § 924(c)(1) (2005) (stating the statutory sentencing enhancements for a person who uses or carries a firearm during and in relation to any crime of violence). If the firearm is brandished, an individual may be sentenced to no less than seven additional years. *Id.* § 924(c)(1)(A)(ii). Thus, a convicted defendant would receive seven years for the first offense, and twenty-five years for each additional offense under Section 924(c)(1)(C)(i). The first offense at seven years plus four additional offenses at twenty-five years apiece would equal 107 years of additional sentencing.

8. See R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About A Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635, 666 (2006) (stating that prosecutors should strive to avoid inequity when making sentencing recommendations); see also David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 533 (1999) (arguing that the legal academy has ignored examining how prosecutors should operate in a system of fixed sentencing).

9. Prosecutorial discretion over charging decisions can affect sentencing through sentencing enhancements. See *infra* Part II. Prosecutors have a large amount of direct and indirect discretion in charging and plea bargaining. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("[Prosecutors] decide whether to offer a

With the Supreme Court's 2005 decision in *United States v. Booker*,¹⁰ prosecutors finally have an incentive to engage with punishment theory.¹¹ In *Booker*, the Court held that the Sentencing Guidelines were merely advisory and that sentences had to comport with the principles of punishment: retribution, deterrence, incapacitation, and rehabilitation.¹² Now, unlike under the mandatory Guidelines regime, prosecutors can no longer simply rely on a particular sentencing calculation. Instead, prosecutors must be prepared to argue the substantive justice of the sentencing result, if only to oppose defense requests for sentences below the advisory Guidelines range.¹³

This Essay examines the interaction of prosecutorial discretion and mandatory sentences during the three different sentencing regimes of the last one hundred years: the pre-Guidelines era, the mandatory Guidelines era, and the advisory Guidelines era. The Essay concludes that the prosecutorial culture that developed during the pre-Guidelines and mandatory Guidelines eras has left prosecutors unprepared to engage in the kind of punishment theory analysis required post-*Booker*. *Booker*, however, has provided prosecutors with an opportunity to change their culture and to develop prosecutorial policies and practices that will ensure that prosecutors exercise their discretion—particularly with regard to charging sentencing enhancements—in ways that are fair, rational, and consistently based on the principles of punishment.¹⁴

I. PROSECUTORIAL DISCRETION AND THE SENTENCING GUIDELINES

The problem of prosecutorial detachment from the purposes of punishment is rooted in the fact that for most of the past one hundred years, federal prosecutors—while jealously guarding their discretion over charging decisions—have viewed sentencing justice as the responsibility of the judicial and legislative branches.¹⁵ Both the pre-Guidelines and mandatory Guidelines systems left little room for prosecutors to affect sentences and did not require them to argue the purposes of punishment in order to defend or oppose sentences. In the current *Booker* era, however, this prosecutorial indifference to punishment theory is, by necessity,

plea to a lesser charge, set the terms of the plea [I]n federal and state jurisdictions governed by sentencing guidelines, these decisions often predetermine the outcome of a case”).

10. 543 U.S. 220 (2005).

11. See Memorandum from James B. Comey, Deputy Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors 1 (Jan. 28, 2005) [hereinafter Comey Memo], available at [http://www.nacdl.org/public.nsf/MediaSources/Booker_Press/\\$FILE/DAGMemoonBooker1.pdf](http://www.nacdl.org/public.nsf/MediaSources/Booker_Press/$FILE/DAGMemoonBooker1.pdf) (acknowledging the importance of punishment principles when outlining official sentencing policy under the advisory Guidelines). The memo was issued soon after *Booker* was decided. Simons, *supra* note 2 at 348.

12. *Booker*, 543 U.S. at 245-46, 260 (citing 18 U.S.C. § 3553(a)(2) (2000)).

13. See *infra* Part I.C (discussing the roles of prosecutors and defense attorneys in arguing for a certain sentencing result after *Booker*).

14. For a more complete treatment of the ideas explored in this Essay, see Simons, *supra* note 2.

15. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL [hereinafter U.S. ATTORNEYS’ MANUAL] § 9-27.710 cmt. B (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.710 (stating that “sentencing in Federal criminal cases is primarily the function and responsibility of the court”).

changing.

A. The Pre-Guidelines Sentencing System: Prosecutorial Passivity in the Face of Broad Judicial Discretion

If our three young men from New York City had committed their robberies in the 1970s, prior to the enactment of the Sentencing Guidelines, they likely would have been charged with violations of the Hobbs Act, the federal robbery statute that carries a sentence of up to twenty years.¹⁶ Thus, five counts of Hobbs Act robbery would have resulted in a sentencing range between zero and one-hundred years. Whether to charge the defendants and how many counts to charge them with would have been decisions made by the prosecutor. What sentence to give them, however, would be left almost entirely to the judge, in the first instance, and then to the parole board.¹⁷

As most federal crimes—now and then—carry extremely broad sentencing ranges, generally without a minimum, the prosecutors' charging decision in the pre-Guidelines system usually determined only the maximum possible sentence that the judge could impose.¹⁸ Prosecutors who wanted to influence the actual sentence could do two things: send a signal to the judge by negotiating over the number of counts to which the defendant would plead, or advocate for a particular sentence at sentencing. In most cases, however, prosecutors took a passive approach and often even explicitly bargained away their power to affect the sentence.¹⁹ This approach is not surprising given the official Department of Justice policy at the time, which instructed prosecutors that "sentencing in Federal criminal cases is primarily the function and responsibility of the court."²⁰ Prosecutors were affirmatively discouraged from making sentencing recommendations, except when "warranted by the public interest."²¹

So, our three defendants would likely have faced a judge who had complete discretion to give them any sentence between zero and one-hundred years. This system of almost unfettered judicial discretion understandably led to sentencing disparities.²² Such disparities came under increased attack in the 1970s and 1980s,

16. 18 U.S.C. § 1951(a) (2000).

17. See GUIDELINES MANUAL ch. 1, pt. A(1)(3) (2009) (indicating that the pre-Guidelines sentencing system required the court to impose an unfixed imprisonment sentence and gave the parole commission the power to determine the length of the sentence an offender would actually serve).

18. See, e.g., 18 U.S.C. § 201(b)(4) (2000) (setting the statutorily permissible sentence for bribing a public official at "not more than fifteen years"); § 1201(a) (setting the statutorily permissible sentence for kidnapping at "any term of years or life"); § 2113 (setting the statutorily permissible sentence for armed bank robbery at "not more than twenty-five years").

19. See, e.g., *United States v. Picone*, 773 F.2d 224, 225 (8th Cir. 1985) (describing the prosecutor's agreement "not to make any recommendations as to sentencing"); *United States v. Consentino*, 685 F.2d 48, 49 (2d Cir. 1982) (stating that the prosecution promised to "'take no position' at sentencing").

20. U.S. ATTORNEYS' MANUAL § 9-27.710(B), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm#9-27.710.

21. *Id.* at § 9-27.730(B)(3), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm#9-27.730.

22. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 1971, at 96 (1971) (reporting that in fiscal year 1971, of those convicted for income

and ultimately resulted in the enactment of the Sentencing Guidelines.²³ When the mandatory Guidelines went into effect in 1987, they replaced a sentencing system that was inconsistent, unpredictable, and had very little direct prosecutorial involvement.

B. The Mandatory Guidelines System: Prosecutorial Calculations in the Face of Sharply Limited Judicial Discretion

If our three robbers had committed their crimes in the 1990s, their sentencing would have been both consistent and predictable—indeed, mathematically predictable. The mandatory Sentencing Guidelines that took effect in 1987 set up a formula that was complicated and rigid.²⁴ The three defendants would each have a base offense level of twenty,²⁵ a five-point enhancement for brandishing a gun (even though it did not work),²⁶ a two-point enhancement for tying up the victims,²⁷ another five-point enhancement for committing five robberies,²⁸ and (assuming they pled guilty) a three-point reduction for the “acceptance of responsibility.”²⁹ Accordingly, our robbers’ offense level would be 29, resulting in a sentence of about eight years.³⁰ It is likely that the ringleader would have received a two-point enhancement for his role in the offense (resulting in an offense level of 31 and a sentence of about ten years)³¹ and the lookout would have received a two-point reduction for his minor role (resulting in an offense level of 27 and a sentence of about six-and-a-half years).³²

Unlike in the pre-Guidelines era, the judge had very little discretion to affect sentencing under the mandatory Guidelines. The prosecutor played an active role, but mostly as a technocrat, almost an automaton. In an effort to ensure uniformity in sentencing, the Sentencing Commission created a “modified real-offense system,” in which the offense of conviction sets the base offense level, while real-offense facts determine the rest of the calculation.³³ Although it would seem that

tax fraud, approximately thirty-five percent received prison terms, the average of which was 9.5 months, while approximately seventy-one percent of defendants convicted of auto theft went to prison where they spent an average of 36.7 months).

23. See MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5–7 (1973) (criticizing Ppre-Guidelines sentencing).

24. See GUIDELINES MANUAL § 5.A (illustrating a complex rubric that takes both criminal history and “offense level” into account in order to determine a sentence range).

25. *Id.* at § 2B3.1(a).

26. *Id.* at § 2B3.1(b)(2)(C).

27. *Id.* at § 2B3.1(4)(B).

28. *Id.* at § 3D1.4.

29. *Id.* at § 3E1.1(a).

30. See GUIDELINES MANUAL at ch. 5, pt. A (creating a prison term of 87-108 months).

31. *Id.* at § 3B1.1; see *id.* at ch. 5, pt. A (determining that an offense level of 31 will carry a sentence of 108-135 months, assuming very low or zero previous criminal history).

32. *Id.* at § 3B1.2; see *id.* at ch. 5, pt. A (determining that an offense level of 27 will carry a sentence of 70-87 months, assuming very low or zero previous criminal history).

33. See *id.* at ch. 1, pt. A(4)(a)-(b) (stating that the Guidelines look at the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted but also take into account a number of important, commonly occurring real offense elements, such as the defendant’s role in the offense, the presence of a gun, or the amount of money actually taken, through

prosecutors had some power to affect the sentence with their charging decisions, their control over the starting point for the Guidelines calculation was severely constrained by the fact that the Guidelines lump similar offenses into the same base offense level.³⁴ In addition, prosecutors could not control the defendant's offense level by deciding not to charge particular conduct, since Guidelines calculations allow the inclusion of certain conduct for which the defendant was not convicted if it was "part of the same course of conduct or common scheme or plan as the offense of conviction."³⁵

Thus, by minimizing the potentially disparate effects of prosecutorial charging decisions, the Sentencing Commission discouraged prosecutorial engagement with sentencing by essentially reducing prosecutors to the role of Guidelines calculators. Not surprisingly, however, prosecutors did not act like automatons—despite the best efforts of policy makers in the Department of Justice, who made clear that prosecutors were responsible for ensuring the consistent application of the Guidelines, regardless of the sentence that resulted.³⁶ Prosecutors nevertheless found a variety of ways to influence sentences, such as by bargaining over the facts that would factor into the Guidelines calculation. Although Department of Justice policy explicitly prohibited the practice, prosecutors would engage in fact-bargaining by controlling the information that was disclosed to the court or by stipulating to certain facts in the hope that the court would accept the stipulation.³⁷ In the case of our robbers from New York City, the prosecutor may have negotiated over the value of the jewels that were stolen or the role that each individual robber played during the spree.

While it is desirable to have prosecutors care about sentencing, fact-bargaining is surreptitious and sidesteps open arguments about the justice of the sentence. It would be far more preferable to encourage prosecutors to engage directly with the principles of punishment.

C. The Advisory Guidelines System: Prosecutorial Advocacy in the Face of Guided Judicial Discretion

If the crime spree had happened today, our three defendants would be facing a different sentencing system. In 2005, in *United States v. Booker*,³⁸ the Supreme Court ruled that the Sentencing Guidelines must be advisory rather than

alternative base offense levels, specific offense characteristics, cross references, and adjustments).

34. See, e.g., GUIDELINES MANUAL § 2B1.1 (lumping together the following offenses in the same offense level: theft; embezzlement; receipt of stolen property; property destruction; and offenses involving fraud or deceit).

35. *Id.* at § 1B1.3(a)(2).

36. See Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors on Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals 1-2 (July 28, 2003) (stressing the importance of faithful and consistent enforcement of sentencing guidelines).

37. See *id.* at 3 (emphasizing that federal prosecutors are not permitted to fact-bargain); Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 294 (2005) (discussing fact-bargaining practices and suggesting greater judicial oversight as a way to combat fact-bargaining).

38. 543 U.S. 220 (2005).

mandatory.³⁹ In particular, the *Booker* Court found Section 3553(b) of the Sentencing Reform Act, which required judges to impose a sentence within the Guidelines range, to be unconstitutional.⁴⁰ By eliminating Section 3553(b)(1), the Court shifted the focus to Section 3553(a), which requires sentencing judges to *consider* the Guidelines ranges and policy statements, but also to consider the traditional purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.⁴¹ Thus, the judge must still calculate a Guidelines range, but that range—about eight to twelve years in the case of our robbers—is only a starting point, and the sentence can be varied up or down significantly based on the judge’s view of the traditional purposes of punishment.⁴² *Booker* also created a new standard for appellate review: sentences are reviewed to determine whether they are “reasonable” under the principles of punishment set forth in Section 3553(a).⁴³

Thus, our three defendants would still face Guidelines calculations that would result in sentences between six and ten years, depending on their role in the offense. But now those Guidelines sentences would only be the starting point. The sentencing judge would also have to consider whether notions of retribution, deterrence, incapacitation, or rehabilitation required different sentences (either higher or lower than the Guidelines sentences). Each defendant’s lawyer would no doubt advocate for a sentence below the Guidelines range, marshalling whatever mitigating factors militate against a harsh sentence. The defense lawyer could focus on the defendant’s lack of criminal history, or on the fact that the gun was inoperable and that no one was injured, or on any deprivations in the defendant’s background that make his criminal activity more understandable. The prosecutor, on the other hand, would likely defend the Guidelines sentence, or perhaps even argue for a more severe sentence based on whatever aggravating factors the prosecutor could marshal (for example, the seriousness of the crime and its violent nature, the fear felt by the victims and the risk that someone could have been

39. 18 U.S.C. § 3553(b)(1) (2000 & Supp. II 2003) (“[T]he court *shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” (emphasis added)), *invalidated by Booker*, 543 U.S. 220.

40. *Booker*, 543 U.S. at 245.

41. 18 U.S.C. §§ 3553(a)(2)(A)-(D). Section 3553(a), in its pertinent parts, requires the court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

...

(2) the need for the sentenced imposed—

(A) . . . 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.

Id. In addition, sentencing judges must consider the need for uniformity and restitution. 18 U.S.C. §§ 3553(a)(6)-(7).

42. *Booker*, 543 U.S. at 245-46.

43. *Id.* at 260-61.

seriously injured, the need to deter violent crimes, and so on). Those defense and prosecution arguments would be repeated on appeal if either party challenged the “reasonableness” of the sentence.

With respect to judicial discretion, *Booker* created—quite by accident—a sentencing system that elegantly balances uniformity and individualization.⁴⁴ The Guidelines serve as an anchor, tempering the worst excesses of unfettered judicial discretion, while the more general principles in Section 3553(a) allow sentencing judges to consider the defendant’s individual situation in the context of the principles of punishment.

The new advisory Guidelines system has changed the prosecutor’s role as well, though in more subtle ways. By focusing the judge’s attention on whether a particular sentence comports with the principles of punishment, the new sentencing system has forced prosecutors to finally engage with sentencing justice. In order to comply with announced Department of Justice policy, which requires prosecutors to actively seek a Guidelines sentence in “all but extraordinary cases” and to oppose a defendant’s request for a sentence outside the appropriate Guidelines range,⁴⁵ prosecutors must be prepared to argue that the Guidelines sentence is consistent with the purposes of punishment, while a lower sentence is not. They can no longer simply argue about the Guidelines calculation. Now, they must also defend the substantive justice of their Guidelines calculation.

This prosecutorial engagement with punishment theory at sentencing is, in my view, a welcomed development. And yet, it is not enough.

II. PROSECUTORIAL DISCRETION AND MANDATORY SENTENCES

The story I have told so far leaves out one important element: mandatory sentences. While *Booker* has created an elegant equilibrium in judicial discretion, prosecutors can eliminate this discretion by charging mandatory sentences. Indeed, mandatory sentences—particularly sentencing enhancements—can effectively make the prosecutor into the sentencer and, if used indiscriminately, can lead to extraordinarily harsh sentences that are grossly out of proportion to the defendant’s conduct and culpability.

A. Mandatory Minimums and Sentencing Enhancements: Prosecutorial Sentencing that Eliminates Judicial Discretion

Mandatory sentences, which pre-date the Guidelines,⁴⁶ come in two types: mandatory minimums and sentencing enhancements. Mandatory minimum sentences establish a minimum sentence of imprisonment for particular criminal

44. See *id.* at 264 (noting its removal of the Sentencing Reform Act’s mandatory provision and related language at issue was consistent with Congress’ intent to provide for certainty and fairness in meeting sentencing purposes while allowing individualized sentencing).

45. Comey Memo, *supra* note 11, at 2.

46. Most current mandatory sentences focus on violent crimes and drug crimes and have been enacted since 1984. U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8–11 (1991), available at http://www.ussc.gov/r_congress/manmin.pdf.

conduct, generally narcotics offenses,⁴⁷ and trump both the Guidelines and the principles of punishment laid out in Section 3553(a).⁴⁸ As to sentencing enhancements, in addition to charging our three robbery defendants with violations of the Hobbs Act, the prosecutor could also charge them with violations of the federal statute known as “Section 924(c),” which enhances the sentence of a person who “uses or carries” a firearm “during or in relation to a crime of violence or drug trafficking crime.”⁴⁹ Section 924(c) requires an additional five-year sentence if a gun is “used or carried”; an additional seven-year sentence if the gun is “brandished”; and an additional ten-year sentence if the gun is “discharged.” For a second offense, the statute requires an additional twenty-five-year sentence.⁵⁰ This sentencing enhancement is not automatic; it applies only if the prosecutor decides to include the Section 924(c) violation as a separate charge. In the case of our three robbers, the prosecutor could charge violations of Section 924(c) for each of the robberies: seven years for the first offense, twenty-five years for each additional offense—mandatory and consecutive.⁵¹

Thus, our robbers’ mandatory minimum sentence for the Section 924(c) violations would be 107 years, to be served in consecutively with their Guidelines sentences for the underlying robberies. The decision whether to include the Section 924(c) charge is left entirely to the prosecutor. All of the detailed calculations that go into the Guidelines are rendered irrelevant. The judicial discretion that was restored by *Booker* is rendered impotent. All the power is now in the hands of the charging prosecutor who, at least by experience, is ill-equipped to reason through a principled basis for making these sentencing determinations.

B. The Need for Engagement with Punishment Theory at the Charging Stage

Because sentencing enhancements allow prosecutors to double or triple sentences simply by filing additional charges, the need for prosecutors to contemplate the justice of the resulting sentence before exercising their discretion is apparent. Yet, prosecutors are not encouraged to consider the principles of punishment when deciding whether to charge mandatory sentences. Official Department of Justice policy instructs prosecutors to file sentencing enhancements in all possible cases, unless they would be inappropriate for reasons of prosecutorial efficiency and docket management.⁵²

47. See *id.* at 37 (stating that while there are a number of mandatory minimum sentencing provisions in the Federal Code, those that apply to narcotics and weapons offenses account for the most convictions).

48. GUIDELINES MANUAL § 5G1.1(b) (“Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.”).

49. 18 U.S.C. § 924(c)(1)(A) (2006).

50. *Id.* § 924(c)(1)(C)(i).

51. Section 924(c) provides that the mandatory sentences of five, seven, or ten years (depending on whether the gun was possessed, brandished, or discharged) must be served consecutively with any sentence imposed for the underlying drug crime or crime of violence. *Id.* §§ 924(c)(1)(A), (D). In addition, the mandatory sentence for any subsequent offense is an additional twenty-five year consecutive sentence. *Id.* §§ 924(c)(1)(C), (D).

52. See U.S. ATTORNEYS’ MANUAL § 9-27.300, available at <http://www.justice.gov/usao/>

This use of mandatory sentences without regard for the justice of the resulting sentence is disconcerting, particularly since there is some evidence that prosecutors will rely on mandatory sentences more frequently in the current advisory Guidelines era to prevent judges from varying too low under the *Booker* authority.⁵³ Confronted with data indicating that an increasing number of defendants are in fact receiving sentences below the Guidelines range,⁵⁴ prosecutors in some offices now routinely charge offenses that carry mandatory minimum sentences and use enhancements to avoid significant downward variances from the Guidelines.⁵⁵

While prosecutors' increased reliance on mandatory sentences to prevent pre-Guidelines sentencing disparities might be understandable, the use of mandatory minimums and sentencing enhancements must be principled to avoid unjust sentences that are out of proportion to the defendant's culpability. *Booker*, by bringing new attention to the principles of punishment in sentencing and creating the "reasonableness" standard for appellate review, provides an excellent

eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.300 ("Such a reason [for not filing an enhancement] might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office."); see also Memorandum on Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing from John Ashcroft, Attorney Gen., U.S. Dep't of Justice, to All Fed. Prosecutors (Sept. 22, 2003), available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm (ordering prosecutors "to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in all appropriate cases," and allowing them to forego enhancements only for reasons of prosecutorial efficiency). One result of this policy is that sentencing enhancements can be used to induce guilty pleas, with prosecutors threatening to file them if the case goes to trial. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1184 n.342 (2001) (describing a former federal prosecutor's experience with an "unwritten policy" that repeat drug offender enhancements should never be filed against defendants who pleaded guilty but always against those who went to trial).

53. See Simons, *supra* note 2, at 348 (noting that, just days after *Booker* was decided, Deputy Attorney General James Comey circulated a memo instructing that federal prosecutors "actively seek sentences within the range established by the Sentencing Guidelines . . .").

54. See, e.g., *Reg'l Hearing on the State of Fed. Sentencing Before the U.S. Sentencing Comm'n* (2009) [hereinafter *Reg'l Hearing*] (statement of Karin J. Immergut, U.S. Attorney for the Dist. of Or., U.S. Dep't of Justice), available at http://www.uscc.gov/AGENDAS/20090527/Immergut_testimony.pdf ("The percentage of defendants sentenced within the guidelines dropped from 72% to 60%, and to 45% in the Ninth Circuit."); *id.* (statement of Michael J. Fitzpatrick, Chief U.S. Prob. Officer for the S. Dist. of N.Y., U.S. Prob. Dep't), available at http://www.uscc.gov/AGENDAS/20090709/Fitzpatrick_testimony.pdf (indicating that the percentage of sentences in the Southern District of New York within the Guidelines range dropped from 78.4% in 2003 to 58.2% in 2006, and to 44.4% in 2008).

55. See *Reg'l Hearing*, *supra* note 54 (statement of Karin J. Immergut); see also *id.* (statement of Lawrence G. Brown, U.S. Attorney for the E. Dist. of Cal., U.S. Dep't of Justice), available at http://www.uscc.gov/AGENDAS/20090527/Brown_Testimony.pdf (stating that, after judges began repeatedly imposing sentences much below the Guidelines range, "[the U.S. Attorney's Office for the Eastern District of California] began more routinely charging receipt and distribution offenses," which carry a sixty-month statutory minimum sentence); *id.* (statement of Dana Boente, U.S. Attorney for the E. Dist. of Va., U.S. Dep't of Justice), available at http://www.uscc.gov/AGENDAS/20090709/Boente_testimony.pdf (stating that her office has "deliberately chosen to investigate and bring cases—in drugs and in other areas, such as child pornography—that qualify for mandatory minimums to avoid significant downward sentencing variances").

framework for prosecutors to think about the justice of charging decisions.⁵⁶ Instead of presumptively filing sentencing enhancements in all cases, prosecutors should be allowed to use their discretion to forego sentencing enhancements unless the particular circumstances of the case make an unenhanced sentence inconsistent with the principles of punishment as set forth in Section 3553(a). In essence, I am arguing that prosecutors should apply *Booker*'s "reasonableness" standard to charging decisions whenever those charging decisions have the effect of determining the sentence.⁵⁷

CONCLUSION

Because sentencing enhancements allow prosecutors to unilaterally create a sentence that is significantly higher than the Guidelines range, it is crucial that prosecutors consider the justice of the resulting sentence when exercising their charging discretion. While Department of Justice policy and years of prosecutorial detachment from sentencing justice have left prosecutors largely unprepared to engage with the principles of punishment, *Booker* has forced prosecutors to "become more conversant in the § 3553(a) factors" and "to engage in greater sentencing advocacy."⁵⁸ Prosecutors' new role as punishment theorists should allow them not only to defend a Guidelines sentence on a principles-of-punishment basis, but also to consider the justice of a sentence that would result from filing sentencing enhancements. Unless this longer sentence is consistent with the purposes enumerated in Section 3553(a), prosecutors should be allowed to use their charging discretion to forego the enhancement. As mandatory sentences become increasingly important due to the advisory nature of the Guidelines, it is crucial that prosecutors develop policies to voluntarily restrict their largely unbridled charging discretion in ways that are fair, rational, and consistently based on the principles of punishment.⁵⁹

56. *Booker*, 543 U.S. at 262 (holding that the proper standard of appellate review for sentencing decisions is review for "reasonableness").

57. See *supra* note 43 and accompanying text (arguing that because sentences within the Guidelines range are presumed to be reasonable and enhanced sentences are generally significantly above this range, sentencing enhancements usually result in sentences that should be considered "unreasonable" under *Booker*, unless justified by unusual or extraordinary circumstances); *supra* Part II.A-B (same).

58. *Reg'l Hearing*, *supra* note 55 (statement of Lawrence G. Brown).

59. As this volume was going to press, the Department of Justice issued revised guidance on charging decisions, plea bargains, and sentencing advocacy. See Memorandum on Dep't Policy On Charging and Sentencing from Eric H. Holder, Jr., Attorney Gen., U.S. Dep't of Justice, to All Fed. Prosecutors (May 19, 2010), available at <http://www.nylj.com/nylawyer/adgifs/decisions/060110holdermemo.pdf>. The Holder Memo explicitly supercedes prior guidance on sentencing and charging, including the memoranda from Attorney General John Ashcroft, see *supra* note 52, and Deputy Attorney General James Comey, see *supra* note 11. While the new instructions are couched in generalities, the intended policy shift is clear. Federal prosecutors are now encouraged to be more flexible, more individualized, and more willing to exercise discretion in making charging decisions (including the charging of mandatory minimums and sentencing enhancements), to be more active advocates at sentencing, and generally to think more deeply about how the principles of punishment should impact charging decisions, plea bargaining and sentencing advocacy in individual cases. Progress!

