Sentencing After *Booker*: The Impact of Appellate Review on Defendants’ Rights

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INTRODUCTION

*United States v. Booker*¹ held that the Federal Sentencing Guidelines ("Guidelines"),² as they were applied at the time, violated defendants’ Sixth Amendment jury trial rights. Unfortunately, *Booker* failed to provide the clarity that judges and commentators—not to mention defendants—had hoped for. The Supreme Court produced a tortured 124-page decision with two conflicting majority opinions. The tension between the majority opinions ran so deep that their authors, Justices Stevens and Breyer, each wrote principal dissents in the case.³ Justice Stevens, in the “substantive majority” opinion (*Booker I*), concluded that the Guidelines violated a defendant’s Sixth Amendment right to have every fact essential to the imposition of a sentence proven to a jury beyond a reasonable doubt.⁴ Stevens proposed a simple solution to the problem: require a jury finding for every fact that increased the Guideline sentence.⁵ But this was not the remedy the Court adopted. Instead, Justice Breyer, in the “remedial majority” opinion (*Booker II*), concluded that the appropriate remedy was to make the Guidelines “advisory.”⁶ Once advisory, the Guideline facts were no longer essential to the punishment and were therefore beyond the scope of the Constitution’s jury trial guarantee. But Justice Breyer was not finished. In order to ensure that judges did not return to the Wild West of pre-Guideline sentencing, Breyer determined that appellate courts would review

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3. See *Booker*, *125 S. Ct. at 771* (Stevens, J., dissenting in part); *id. at 802* (Breyer, J., dissenting in part).
4. *Id. at 755-56* (Stevens, J.). Justice Stevens was joined by Justices Scalia, Souter, Thomas, and Ginsburg.
5. See *id. at 779* (Stevens, J., dissenting in part).
6. *Id. at 757* (Breyer, J.). Justice Breyer was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Ginsburg.
sentencing decisions to determine whether they were "unreasonable."\(^7\)

How these two majority opinions fit together remains a puzzle, in part because of an inherent contradiction in Justice Breyer’s remedial opinion. On the one hand, by declaring the Guidelines merely advisory, *Booker II* seems to grant judges discretion to sentence a defendant anywhere within the statutory penalty range—the kind of discretion that is arguably necessary to comply with *Booker I*. On the other hand, *Booker II* clearly implies that sentences shouldn’t stray too far from the Guidelines.

Thus, a central question emerges: Can *Booker II* preserve the Guidelines in a meaningful way without running afoul of *Booker I*? In other words, can our sentencing regime be rigid enough to maintain a meaningful role for the Guidelines while remaining flexible enough to maintain a meaningful role for the jury and to satisfy *Booker I*’s core Sixth Amendment holding? The answer to this question, and the subject of this Note, is rooted in the concept of "reasonableness"—the standard by which appellate courts will judge sentencing decisions.

This Note makes three central assertions about "reasonableness" review that are crucial to understanding the ramifications of *Booker*, and ultimately harmonizing its discordant opinions. For now, these claims will necessarily remain abstract, but they will come into sharper relief with concrete examples in the pages that follow. First, as appellate courts have begun to review sentences for reasonableness, they have focused not only on the procedures employed by district courts, but also on the substantive merits of the sentences—i.e., whether the facts of the cases and the reasoning of the sentencing judge are sufficient on the merits to justify the sentence imposed. Accordingly, as appellate courts have applied this substantive review, they have begun declaring sentences for particular crimes unreasonably high and unreasonably low. As time passes, we are likely to see more and more circuit opinions declaring, for instance, that ten years imprisonment for a first time offender selling ten ounces of marijuana is unreasonably high, or that probation for an armed carjacker with a long criminal history is unreasonably low.

Second, these appellate decisions will, over time, create "reasonable ranges" for various offenses. These reasonable ranges will potentially allow district courts broad discretion but will also place enforceable upper and lower limits on that discretion. By cabining judicial discretion in this manner, these reasonable ranges raise the same conceptual Sixth Amendment problems that the Guidelines did in *Booker*.

Third, when an appellate court assesses whether a sentence is reasonable, it must base that assessment on the facts of conviction—the facts that were proven to a jury or admitted by the defendant—and not facts that were proven

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7. *Id.* at 765-66 (Breyer, J.).

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to a judge by a mere preponderance of the evidence at a sentencing hearing. In other words, the sentence must be "reasonable" without reference to aggravating factors that have neither been proven to a jury nor proven to a judge beyond a reasonable doubt. Appellate courts have not adopted this position and are currently considering not only the facts of conviction, but also facts found by a preponderance of the evidence at a sentencing hearing to determine whether a sentence is reasonable. In doing so, these courts commit errors of logic and violate the core holding of Booker I.

Building on these assertions, it becomes clear that a defendant has a right to have any fact that is essential to the reasonableness of a sentence be proven to a jury. Further, should a defendant chose to waive that right (in a plea, for instance), due process still requires a judge to find those "essential" aggravating facts beyond a reasonable doubt, rather than by a preponderance of the evidence. These conclusions, although not intuitive, flow directly from the line of cases beginning with Apprendi v. New Jersey\(^8\) and continuing through Booker. Moreover, they provide concrete substance to the rights these cases sought to vindicate without running afoul of Justice Breyer's Booker II remedy.

The Note proceeds in three Parts. Part I examines the contours of reasonableness review under Booker, demonstrating that appellate courts will engage in a substantive review of sentence length—not just a review of the procedures employed by the trial judge. Part II explores the implications of this substantive assessment. By employing a series of three hypothetical examples, I argue that even in an advisory Guideline regime, an appellate court's determination of reasonableness must be based only on the facts of conviction. If a particular aggravating fact is essential to the reasonableness of a sentence, that fact must be proven to a jury or admitted by the defendant. I argue that this conclusion is an outgrowth of the evolution of the Apprendi-Booker line of cases. Part III examines how a common law of sentencing will, over time, create a range of "reasonable" sentences for various offenses and translates the theoretical framework into a more practical set of principles that are rooted in current doctrine. This Part aims to honor the core holding of Booker I, while maintaining fidelity to Justice Breyer's remedial opinion in Booker II.

### I. JUDICIAL DISCRETION AND REASONABLENESS REVIEW

There is one point on which the otherwise fractured Booker court was unanimous: "[T]he constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges . . . . For when a trial judge exercises his discretion . . . within a defined range, the
defendant has no right to a jury determination of the facts that the judge deems relevant." The basis of the agreement, of course, is discretion: Where a judge can impose a sentence anywhere in a given range, Sixth Amendment protections simply are not implicated. Such was the case, for instance, in the pre-Booker regime when a judge selected a sentence within a properly calculated Guidelines range. If the Guidelines yielded a penalty range of seventy-eight to ninety-seven months imprisonment, a judge could sentence the offender anywhere within that range essentially for any reason—or no reason at all. And that discretion was unreviewable.

In the wake of Booker, district and appellate judges have spent considerable energy determining just how much weight to accord the now advisory Guidelines. But it is crucial to understand that Booker imposes no legal obligation on judges to place any particular weight on the Sentencing Guidelines. The Guidelines themselves no longer cabin judicial discretion; otherwise all nine Justices could not have agreed to the statement quoted above. It is true that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." But this requirement is merely procedural. As Justice Stevens correctly noted in his dissent, the Guideline "range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in" what remains of the Sentencing Reform Act. While courts appear statutorily bound to perform a complete and accurate Guideline calculation, Booker II does not demand any particular level of deference to the Guideline sentence. Indeed, district judges have varied greatly in the weight they have chosen to grant the Guidelines. Judge Paul Cassell in the District of Utah has decided to accord the Guidelines "heavy weight" and has stated that he intends to issue sentences that deviate from the Guidelines only "in unusual

10. See, e.g., Williams v. United States, 503 U.S. 193, 205 (1992) ("The selection of the appropriate sentence from within the guideline range . . . [is a decision] left solely to the sentencing court.").
11. Booker, 125 S. Ct. at 767 (Breyer, J.).
12. Id. at 787-88 (Stevens, J., dissenting in part). Justice Scalia added that with respect to the Guidelines (but not necessarily with respect to appellate review), "district courts have discretion to sentence anywhere within the ranges authorized by statute—much as they were generally able to do before the Guidelines came into being." Id. at 790 (Scalia, J., dissenting in part).
13. See 18 U.S.C.A. § 3553(a)(4)(A) (West Supp. 2005) (stating the Court "shall consider . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines") (emphasis added). The Court severed and excised only two provisions of the sentencing statute—section 3553(b)(1), requiring mandatory application of the Guidelines, and § 3742(e), dealing with the standard of review on appeal. Booker, 125 S. Ct. at 764 (Breyer, J.). The rest of the statute, including § 3553(a)(4)(A), "satisfies the Court's constitutional requirements." Id.; see also United States v. Crosby, 397 F.3d 103, 112 (2d Cir. 2005) (holding that a proper Guidelines calculation is still required post-Booker). But a judge may not need to resolve all factual issues or ambiguous grounds for departure where that judge declines to impose a Guideline sentence. See, e.g., Crosby, 397 F.3d at 112.
cases for clearly identified and persuasive reasons.\textsuperscript{15} Judge Lynn Adelman in the Eastern District of Wisconsin has decided to accord the Guidelines no particular weight at all and intends to rely on them only to the extent he finds them persuasive in a given case.\textsuperscript{16} Judge Nancy Gertner in the District of Massachusetts has split the difference between these two poles, holding that “advisory” Guidelines should “constitute a regime based on rules of general application—what many have described as a common law of sentencing . . . .”\textsuperscript{17} And “in this regime” the Guidelines “are very important, but they cannot be outcome-determinative without running afoul of \textit{Booker}.”\textsuperscript{18} All of these approaches are permissible under \textit{Booker}, and the “correctness” of any particular approach must be assessed not by looking to the text of \textit{Booker}, but by looking to one’s own normative view of the appropriate purposes and practices of sentencing. \textit{Booker} provides only one legally binding requirement that may cabin judicial discretion: Decisions must be “reasonable.”

Reasonableness is therefore the wildcard of the \textit{Booker} opinion. Unfortunately, Justice Breyer failed to define a “reasonable” sentence in an advisory Guideline regime.\textsuperscript{19} Although all the circuit courts have discussed the contours of “reasonableness” in the abstract, few have provided concrete guidance to lower courts.\textsuperscript{20} The emerging consensus is that reasonableness, like so many concepts in law, possesses both procedural and substantive attributes. Although the line between substance and procedure is always blurry, one can usefully define procedural reasonableness as pertaining to the methodology the

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} United States v. Ranum, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005) (Adelman, J.) (“[C]ourts 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 reasonable . . . .”).
  \item \textsuperscript{17} United States v. Jaber, 362 F. Supp. 2d 365, 370 (D. Mass. 2005) (Gertner, J.).
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} Breyer claims that courts of appeals are already “familiar” with his reasonableness standard. United States v. Booker, 125 S. Ct. 738, 766 (2005) (Breyer, J.). But the cases he cites do not necessarily support this claim. Breyer notes that 16.7% of sentencing appeals involved departures and sentences after the revocation of supervised release—two classes of appeals in which the standard of review was already “reasonableness.” But typically, very few of these cases turned on whether the sentence was substantively “reasonable.” Most turned on the question of whether a departure was available at all—a question that is reviewed de novo. \textit{See, e.g.}, United States v. Cook, 291 F.3d 1297, 1300-02 (11th Cir. 2002), \textit{cited in Booker}, 125 S. Ct. at 766 (Breyer, J.); United States v. Olabanji, 268 F.3d 636, 637-639 (9th Cir. 2001), \textit{cited in Booker}, 125 S. Ct. at 766 (Breyer, J.); United States v. White Face, 383 F.3d 733, 737-40 (8th Cir. 2000), \textit{cited in Booker}, 125 S. Ct. at 766 (Breyer, J.).
  \item \textsuperscript{20} At the time of this writing, only three circuit courts have vacated sentence as “unreasonable” under \textit{Booker}. The Eight Circuit was the first. \textit{See} United States v. Rogers, 400 F.3d 640 (8th Cir. 2005); \textit{see also} United States v. Dalton, 404 F.3d 1029 (8th Cir. 2005) (finding a § 5K1.1 departure from the mandatory minimum sentence of 240 months to sixty months unreasonable); United States v. Haack, 403 F.3d 997 (8th Cir. 2005) (finding a § 5K1.1 departure from the mandatory minimum sentence of 120 months to 180 months unreasonable). The Second Circuit soon followed. \textit{See} United States v. Doe, 128 F. App’x 179 (2d Cir. 2005); \textit{see also infra} text accompanying note 51. Finally, the Eleventh Circuit held that a twenty-level downward departure based on the defendant’s physical condition was unreasonable whether under the pre- or post-\textit{Booker} standard of appellate review. \textit{See} United States v. Smith, 128 F. App’x 89 (11th Cir. 2005).
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court employs in determining a sentence. For instance, most courts consider a correct calculation of the Guidelines an essential procedural step in the ultimate determination of a sentence. Substantive reasonableness, in contrast, pertains to whether, on the merits, the underlying facts and conclusions support a particular sentence.

One could certainly envision appellate review based exclusively on procedural reasonableness. For instance, an appellate court could simply confirm that the district court reviewed all the relevant information, held any necessary hearings, interpreted the Guidelines and the sentencing statutes correctly, and considered all the relevant legal authority. If a district court so complied, then any sentence within the statutory range would be presumptively reasonable, and essentially unreviewable—much like pre-Booker sentences selected from within the correct Guideline range. Indeed, the tremendously high volume of sentencing appeals and the mere handful of sentences vacated as unreasonable might suggest that some appellate courts, as a matter of fact, are applying this rather perfunctory analysis.

This kind of procedural review would alleviate most due process and Sixth Amendment concerns, as it would not significantly curb judicial discretion within the statutory penalty range. The entire statutory range would remain open to judges, as long as they convinced appellate courts that they considered all the relevant information, and they sufficiently articulated the rationale for their sentencing decisions. But there are at least two reasons to believe that post-Booker appellate review will be more probing. First, Justice Breyer’s Booker II opinion implies that reasonableness review will be more rigorous than simply determining whether the district courts checked the correct boxes. Second, post-Booker appellate cases indicate that circuit courts are following Justice Breyer’s opinion by independently analyzing the purposes and intent of the sentencing statutes in order to determine whether a sentence is reasonable on the merits. As I will demonstrate in Parts II and III, such substantive review for “reasonableness” will necessarily curb judicial discretion within the statutory penalty range, and thus will raise Sixth Amendment (and due process) concerns.

Justice Breyer noted in Booker II that “Congress’ basic statutory goal” was “a system that diminishes sentencing disparity,” and he has attempted to fashion a remedy that honors that goal. A reasonableness standard that relied

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21. See, e.g., United States v. Chriswell, 401 F.3d 459, 463 (6th Cir. 2005); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005); United States v. Crosby, 397 F.3d 103, 112 (2d Cir. 2005).
22. See Booker, 125 S. Ct. at 765-66 (Breyer, J.) (noting that appellate courts’ reasonableness review will be guided by the factors set forth in the sentencing statute).
23. Id. at 759 (Breyer, J.).
24. Indeed, Breyer believes that this kind of substantive review, over time, will “further [the] objectives” of “honesty, uniformity, and proportionality in sentencing,” id. at 767 (internal quotation marks omitted), and “would tend to iron out sentencing differences,” by “help[ing] to avoid excessive
on nothing more than "ritualistic incantation[s]" by sentencing judges would do little to reduce sentencing disparity. Instead, *Booker II* seems to hold that reasonableness review will comprise a substantive review on the merits of the sentence. Breyer notes: "Section 3553(a) remains in effect and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." The § 3553(a) factors Breyer referred to include whether the sentence "reflect[s] the seriousness of the offense[,] ... promote[s] respect for the law, and ... provide[s] just punishment for the offense." In addition, the statute requires courts to determine whether the sentence "afford[s] adequate deterrence to criminal conduct[,] ... protect[s] the public from further crimes of the defendant" and provides the defendant with any necessary rehabilitative treatment. In short, the statute provides a set of normative criteria, and it is difficult to imagine appellate courts assessing these criteria by scrutinizing procedures alone. Whether a sentence provides "just punishment" or "adequate deterrence" invites a judgment that extends beyond the realm of mere procedural correctness. In his dissent, Breyer even provides a concrete example of this kind of substantive appellate review where he invites us to "imagine an appellate opinion that says a sentence for ordinary robbery greater than five years is unreasonably long unless a special factor, such as possession of a gun, is present." The determination that simple robbery merits five years or less is a substantive rule of law which no set of district court procedures could circumvent.

But more important than what Breyer intended is how appellate courts are executing his remedy. *Booker*'s age is still measured in months, so the number of appellate cases seriously engaging in reasonableness review under *Booker* is relatively small. Yet the courts that have spoken on the subject have unanimously indicated that "reasonableness" requires both a procedural inquiry as well as an inquiry on the merits as to whether the facts of the case justify the length of the sentence.

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26. *Booker*, 125 S. Ct. at 766 (Breyer, J.). The Second Circuit took this passage to mean that it would be a mistake to think that, after *Booker*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." United States v. Crosby, 397 F.3d 103, 113-14 (2d Cir. 2005).
29. See, e.g., United States v. Hughes, 401 F.3d 540, 556 n.14 (4th Cir. 2005) ("The determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also the method employed in determining it."); United States v. Paladino, 401 F.3d 471, 488 (7th Cir. 2005) (noting that "reasonableness depends not only on the length of the sentence but on the process by which it is imposed"); United States v. Fleming, 397 F.3d 95, 100 (2d Cir. 2005) (noting that "brevity or length of a sentence can exceed the bounds of 'reasonableness'"); see also United States v. Selioutsky, 409 F.3d 114, 118 (2d Cir. 2005) ("Although it is arguable that an appellate court could satisfy its reviewing
opinion on "reasonableness," explicitly stated that reasonableness review involves inquiring whether "the decision on its merits exceeded the bounds of allowable discretion." The Eighth Circuit has concurred, adding that a sentencing court's "discretion is not without limits, and appellate review is not an empty exercise." In short, as reasonableness review continues to mature, it will almost certainly have a significant substantive component.

This kind of substantive review may come in different flavors. For instance, a court may limit itself to an interrogation of the district court's justification for a particular sentence. In that case, if the appellate court is not satisfied with the justification, it would simply vacate the sentence and remand the case in order to provide the district court with an opportunity to shore up its conclusions. For instance, in United States v. Selioutsky, the Second Circuit held that the district judge misinterpreted the Guidelines when he departed downward based on the defendant's exceptional family circumstances. The court vacated the sentence and offered the district judge an opportunity to determine whether the original sentence should nonetheless be imposed not on the basis of a departure, but on the basis of the sentencing discretion granted in Booker. This method of review is similar to that which is applied in some administrative law contexts.

An appellate court may make a different kind of substantive inquiry, responsibilities under Booker solely by determining whether the sentence imposed is reasonable as to length . . . review of a sentence for 'reasonableness' [is] not limited to consideration of the length of the sentence."; United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) (stating that "fact specific" reasons for a sentence outside the Guideline range are "essential" to appellate review for reasonableness).

30. United States v. Crosby, 397 F.3d 103, 114 (2d Cir. 2005) (emphasis added). Most often that error of law has been the miscalculation (or failure to calculate) the appropriate Guidelines sentence. See, e.g., United States v. Price, 409 F.3d 436 (D.C. Cir. 2005) (vacating a sentence as unreasonable where the district judge incorrectly applied the sentencing guidelines).


32. 409 F.3d 114 (2d Cir. 2005).

33. Id. at 119-20.

34. It resembles in particular the manner in which informal rulemaking by administrative agencies is reviewed under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2000). Under the APA, appellate courts first determine whether the agency correctly understood the law. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984). The court then considers whether the agency action was "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). At least as a matter of doctrine (though perhaps not always as a matter of practice), it is irrelevant whether the reviewing court agrees with the agency's decision on the merits. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971) (noting that while the procedural inquiry may be extensive, the court is not empowered to substitute its judgment for that of the agency). If the agency has followed the correct procedures, and has sufficiently articulated its rationale, then the agency's decision will likely stand. See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983). When an agency does not meet this deferential standard, the reviewing court generally remands the decision to the agency and permits it to articulate better reasons to justify the same policy decision. See Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947). In other words, the reviewing court gives the agency a chance to perfect the procedures through which the decision was made. This kind of review does have a substantive component, but it also recognizes that there is a broad array of possible policy outcomes—all of which will withstand appellate scrutiny if the agency applies the correct procedures.
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however. Several courts have already begun examining sentence length by interrogating the facts in relation to both the Guidelines and the § 3553 factors, and have concluded that particular sentences were unreasonably long or short, irrespective of any potential justification by the sentencing judge. In these cases, the appellate courts have vacated the sentences and have asked not for more persuasive reasons, but for the district judges to resentence the defendants to longer or shorter terms.

The Eight Circuit appears to have been the first court to vacate a sentence in this manner. In United States v. Rogers, the court concluded that five years of probation for illegal possession of a firearm by a convicted felon was simply "unreasonable," despite the trial court's finding that the defendant had demonstrated "extraordinary" rehabilitation since the time of conviction. The defendant pleaded guilty to a violation of 18 U.S.C. § 922(g)(1), which carried a maximum penalty of ten years imprisonment. The sentencing Guidelines called for fifty-one to sixty-three months in prison. The Eighth Circuit relied heavily on the fact that the firearm possession was Rogers's second parole violation in concluding that five years of probation was insufficient to satisfy the statutory purposes of sentencing. Without any hand wringing, the appellate panel concluded that probation did not provide "adequate deterrence," nor did it "protect the public from criminal conduct," given that the offender had already violated parole. Moreover, the sentence "[did] not adequately address the history and characteristics of the defendant" in light of his admitted use of illegal drugs and his prior convictions. Finally, a "sentence of probation does not properly consider Congress's desire to avoid unwarranted sentencing disparities," given that "[i]t is unreasonable to expect that defendants with similar records, guilty of similar conduct, would receive probation." The reasoning in Rogers was not particularly penetrating or nuanced; the circuit court simply disagreed with the trial court's sentence, based on an independent assessment of the facts of the case and the purposes of sentencing. Apparently no justification, given the facts of the case, would correct the error perceived by

35. 400 F.3d 640 (8th Cir. 2005).
36. Id. at 641-42. The district court sentenced Rogers before Booker was decided, but the appellate court used Booker's reasonableness standard to review the sentence. Because the trial court sentenced Rogers before Booker, we cannot know how the judge would have justified his use of discretion. But the Eighth Circuit's opinion makes that justification moot: It is clear that the Eighth Circuit feels that no explanation could justify a sentence of probation only.
37. 18 U.S.C. § 924(a)(2) (2000) ("Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.").
38. Rogers, 400 F.3d at 641.
39. Id. at 642 (citing 18 U.S.C. § 3553(a)(2)(B) (2000)).
40. Id. (citing § 3553(a)(2)(C)).
41. Id. (citing § 3553(a)(1)).
42. Id. (citing § 3553(a)(6)).
43. Id. It is worth noting that rehabilitation and retribution were not discussed in the opinion.
the Eighth Circuit. The sentencing statute demanded a harsher punishment.

Not long after Rogers, the Eighth Circuit vacated a second sentence in a similar manner under Booker. In United States v. Haack, 44 the court examined the extent of a downward departure for substantial assistance to authorities. 45 The district court had departed below the mandatory minimum of 120 months, sentencing the defendant to eighteen months incarceration. After carefully rehearsing the facts and the extent of the defendant's assistance, the court was "left with the firm impression that the district court reached outside the permissible range of choice and abused its discretion by departing downward to an 'unreasonable degree.'" 46 On the merits, eighteen months were simply not enough. 47 Likewise, the Eleventh Circuit concluded in United States v. Smith that a twenty-level downward departure for an "extraordinary physical impairment" was, on the facts of the case, "unreasonable and/or clearly erroneous" regardless of whether the assessment was made "in a pre-Booker world" or a "post-Booker world." 48

Although the courts in Rogers, Haack, and Smith concluded that the sentences were unreasonably low, it is easy to see that the same methodology could lead a court to conclude that a sentence is unreasonably high. 49 For instance, the Eighth Circuit could have determined, on the facts of Rogers, that a statutory maximum sentence of ten years was unreasonable. After all, the Sentencing Reform Act requires a court to "impose a sentence sufficient, but not greater than necessary, to comply with the [statutory] purposes" 50 of sentencing.

The Second Circuit reached such a conclusion in United States v. Doe. 51 Doe was convicted of two counts of making false statements on passport applications. The presentence report ("PSR") suggested a Guideline range of six to twelve months incarceration. Since Doe had already spent eighteen months in jail, the PSR recommended a sentence of time served. But Doe refused to divulge his true identity, and as a result, the sentencing judge departed upward, sentencing him to the statutory maximum of ten years in

44. 403 F.3d 997 (8th Cir. 2005).
46. Haack, 403 F.3d at 1004 (emphasis added).
47. Id. at 1005 ("We must conclude, however, that the significance and usefulness of the assistance and its nature and extent in this case were such that the departure was excessive.").
49. There is, of course, a constitutionally significant difference between a determination that a sentence is too low (which would, in effect, create a minimum sentence) and a determination that a sentence is too high. Compare Harris v. United States, 536 U.S. 545 (2002) (holding that the facts necessary to trigger mandatory minimum sentences may be found by a judge by a preponderance of the evidence) with Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that the facts necessary to trigger sentences above the statutory range for the offense of conviction violate the Sixth Amendment and Due Process Clause).
51. 128 F. App'x 179 (2d Cir. 2005).
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prison. The Second Circuit determined that the sentence was unreasonable "[i]n light of the crime charged, Doe's lack of any provable criminal history, and the district court's inadequate balancing of these factors against the perceived threat posed by Doe . . . ."  

Although Doe's refusal to surrender his name was "vexing" and "potentially obstructive" of the immigration process, it did not justify a ten year sentence. Significantly, the appellate panel did not remand for a further explication of reasons for the sentence. This would have been the appropriate course if the Second Circuit believed a sentence of ten years was within the judge's range of discretion, and therefore could have been reasonable if the judge had provided a more persuasive justification. Instead, the court vacated the sentence and remanded the case for resentencing by "a district judge who has not previously dealt with this case."  

What is beginning to emerge from the *Booker II* remedial opinion is a sentencing regime in which judges are not, in fact, authorized to impose a sentence anywhere within the statutory range. Rather, judges' sentencing discretion is cabined within a smaller "reasonable range" whose upper and lower bounds are being developed for various offenses as appellate case law evolves. The next Part will explore the implications of this observation.

II. IMPLICATIONS OF SUBSTANTIVE REASONABLENESS REVIEW—A THOUGHT EXPERIMENT

The following thought experiment presents three related hypothetical cases, based loosely on the facts of an actual case prosecuted in the District of Massachusetts. These hypotheticals will help bring the implications of reasonableness review into clearer focus, and will support the conclusion that appellate review of sentences under *Booker* has significant Sixth Amendment implications.

A. Hypothetical A

Consider a defendant—let's call him Ackerman—who is indicted for

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52. *Id.* at 181.
53. *Id.*
54. *Id.* at 180.
56. This is at odds with the substantive majority position in *Booker I*; recall that the reason that an "advisory" Guideline system survived constitutional scrutiny was because, in theory, a jury verdict authorized a judge to sentence a defendant anywhere within the statutory range. But we now see that this is not the case.
57. This series of hypothetical cases is based loosely on United States v. Astronomo, 183 F. Supp. 2d 158 (D. Mass. 2001). This case was discussed extensively at a sentencing workshop conducted at Yale Law School involving district judges, lawyers, and students on March 4, 2005.
attempting to launder $60,000 in violation of 18 U.S.C. § 1956(a)(3).

Ackerman, who has no criminal record, participated in a series of transactions in which undercover investigators arranged to have $60,000 laundered through Ackerman's criminal contacts. The maximum statutory penalty for attempted money laundering is twenty years imprisonment. Ackerman pleads guilty to the conduct alleged in the indictment—attempting to launder $60,000. The government alleges no relevant criminal conduct, and no facts are contested at sentencing. In this situation, the Guidelines prescribe a sentencing range of twelve to eighteen months. Of course, under Booker, a judge is not bound to impose a sentence within this range. But because the sentence must be reasonable, and because appellate courts will make an independent assessment as to whether the sentence comports with the statutory purposes of sentencing, judicial discretion within the statutory range is not boundless. There is some range of reasonableness—whose limits are admittedly ill defined—that cabins judicial discretion within the statutory range for this particular set of facts. We can represent these elements in a simple diagram below:

The judge may exercise fairly broad discretion, as indicated in the diagram by the large "reasonable range" from $x$ to $y$.

By hypothesis, there are no aggravating circumstances beyond what Ackerman admitted in his plea. Therefore the facts of conviction—i.e., the facts Ackerman admitted—are the only facts that enter the sentencing calculus. These are the facts that define the "reasonable range" indicated in the diagram. Because $y$ is the upper limit of the reasonable range, it constitutes the maximum sentence that the judge may lawfully impose in this case.

I have depicted a relatively broad range even in the absence of contested facts because Booker permits judges to rely on considerations that go beyond

59. U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (2004). Section 2S1.1 assigns a base offense level of eight, "plus the number of offense levels from the table in § 2B1.1," which is another six in this case. In addition, section 2S1.1(b)(2)(B) requires an additional two-level increase. Id. Because the defendant pleaded guilty, he would arguably merit a three-level decrease under section 3E1.1 for "acceptance of responsibility." One may certainly quibble with the specifics of this calculation—there is often more flexibility in calculating a Guideline range than judges and commentators admit. However, for the purpose of this hypothetical, the precise calculation is not as important as its general location within the statutory penalty range.
the list of aggravating and mitigating factors enumerated in the Guidelines, as long as those considerations are permitted by § 3553(a). But it is safe to say that no judge—no matter how compelling her reasoning—could sentence Ackerman to, for instance, twenty years in prison. As Judge Bataillon put it: "It cannot be seriously disputed, for example, that it would be unreasonable to impose . . . the maximum sentence of twenty years on a first-time offender for distribution of a small amount of a controlled substance." A similar case can be made in sentencing Ackerman.

One might conceptualize the statutory penalty range as the cumulative total of all "reasonable ranges" for the elements of conviction, plus other mitigating or aggravating factors. In the absence of any aggravating factors, the top of the reasonableness range (y) is less than the statutory maximum. Likewise, in the absence of any mitigating factors, the bottom of the reasonableness range (x) is greater than the bottom of the statutory range. In other words, the bottom of the statutory range is reserved for sympathetic offenders, and the top of the statutory range is reserved for the worst offenders. This framework is consistent with the cases cited in Part I, which demonstrate that a given set of facts does not support total discretion within the entire statutory range, no matter how compelling a judge's reasoning may be.

Ackerman's case is relatively simple because the facts contained in the indictment are the only facts relevant to his sentencing. We can now consider a second iteration of this hypothetical in which the government alleges aggravating factors.

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60. A detailed discussion of the possible justifications that would satisfy Booker's reasonableness requirement is beyond the scope of this Note, but Booker seems to permit judges to exercise their discretion for any number of reasons. For instance, the judge might rely on academic studies, if available, that demonstrate money launderers are particularly likely to be recidivists, and therefore public safety demands a longer period of incapacitation than that which the Guidelines suggest. Or perhaps she finds that money laundering is a particularly troublesome and persistent crime in her district, and she therefore concludes that deterrence requires a sentence above what the Guidelines suggest. Cf. United States v. Lucania, 379 F. Supp. 2d 288, 296 (E.D.N.Y 2005) ("[A]lthough subjective considerations such as 'local mores' or feelings about a particular type of crime may not be an appropriate basis for granting a Guidelines departure or a non-Guidelines sentence, that the crime will have a greater or lesser impact given the locality of its commission is appropriately considered in crafting a reasonable sentence post-Booker."). All that is required is that the reasoning fit within the § 3553(a) factors.

61. Variations of this fact pattern were discussed with four federal district judges from three districts, all of whom agreed that reasonableness review would not permit a sentence near the top of the statutory range in this case without the finding of additional aggravating facts.

62. United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019, 1024-25 (D. Neb. 2005) (Bataillon, J.). Judge Bataillon added: "Nor, for that matter . . . can it be seriously disputed that it would be unreasonable to impose the statutory maximum term of twenty years of imprisonment for scanning and printing a twenty-dollar bill on a home computer and cashing it for food at a Kwik Shop." Id. at 1025. Judge Bataillon seems to be tapping into a common sense notion of rough proportionality in sentencing. As Justice Breyer noted in Booker II, proportionality was one of Congress's goals in creating the Guidelines framework. See United States v. Booker, 125 S. Ct. 738, 767 (2005) (Breyer, J.).

63. E-mail from Kate Stith, Lafayette S. Foster Professor of Law, Yale Law School, to author (Apr. 14, 2005) (on file with author).
B. Hypothetical B

Consider a new case in which another defendant, Balkin, has been indicted for the same offense as Ackerman—attempted laundering of $60,000. But unlike the Ackerman’s case, the government now alleges an array of relevant conduct to be considered as aggravating factors at sentencing. Fortunately for the Assistant U.S. Attorney, Balkin’s guilty conscience has troubled him deeply ever since his arrest. He has therefore decided, against the advice of his lawyer, to admit to all the allegations of relevant conduct contained in the PSR. Those allegations are substantial, and include, for starters, additional attempted money laundering transactions exceeding one million dollars. The government also alleges that Balkin used sophisticated laundering techniques and believed that the cash he was laundering came from drug dealing—two facts that trigger Guideline enhancements.\textsuperscript{64} Finally, the government claims that in order to carry out his money laundering activities, Balkin became deeply involved in an organized crime family and threatened to kill a suspected government informant whom he believed would interfere with his money laundering scheme. In its sentencing memorandum, the government argues that Balkin’s conduct, aside from triggering an array of enhancements, also justifies an upward departure from Criminal History Category I to Category III.\textsuperscript{65} Because Balkin freely admitted to the conduct, the standard of proof and jury trial rights are not at issue. So we arrive at the Guideline calculation: Without a departure, the applicable Guideline range is likely 135 to 168 months.\textsuperscript{66} With the departure to Criminal History Category III, the Guideline sentence rises to 168 to 210 months.\textsuperscript{67} The situation is depicted in Figure 1.2 below:

\begin{itemize}
  \item \textsuperscript{64}See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1(b)(3) (sophisticated means enhancement); \textit{id.} § 2S1.1(b)(1) (drug proceeds enhancement).
  \item \textsuperscript{65}This is a departure that the government requested in the case upon which the hypothetical is based. See United States v. Astronomo, 183 F. Supp. 2d 158, 174 (D. Mass. 2001). In Astronomo, however, the government also alleged relevant conduct that included murder. \textit{id.}
  \item \textsuperscript{66}Balkin’s offense level is thirty-three, calculated as follows: The Guidelines prescribe a base offense level of eight. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1(a)(2). Sixteen levels are added because Balkin laundered over one million dollars. See \textit{id.} § 2B1.1. In addition, Balkin qualifies for a six-level increase because he believed the funds came from drug proceeds, \textit{id.} § 2S1.1(b)(1), a two-level increase because he was convicted under 18 U.S.C. § 1956, \textit{id.} § 2S1.1(b)(2)(B), and another two-level increase because the offense involved sophisticated money laundering, \textit{id.} § 2S1.1(b)(3). Balkin obstructed justice by threatening a government informant and thus earns an additional two-level increase. \textit{id.} § 3C1.1(c). Finally, he earns a three-level downward adjustment for acceptance of responsibility. \textit{id.} § 3E1.1. Again, for the purposes of this thought experiment, the precise calculation is not as important as the general location of the guideline range within the statutory range.
  \item \textsuperscript{67}\textit{id.} ch. 5 pt. A (sentencing table).
\end{itemize}
Here again, because Balkin has admitted to all conduct necessary to impose the sentence, no Sixth Amendment issue is raised. The judge has a broad range of discretion, bounded by points $a$ and $b$ in the diagram. What is crucial to note here is that this reasonable range has shifted based on facts that the defendant admitted. Ackerman and Balkin were convicted of the same crime, but because Balkin confessed to a multitude of relevant criminal conduct, a new, higher “reasonable range” emerged. A sentence of 240 months would have been unreasonably high for Ackerman, but seems reasonable for Balkin. Moreover, the defendant’s admission saves this analysis from any due process or Sixth Amendment scrutiny. With these two cases as a foundation, we can now turn to the question of how to treat a defendant who contests allegations of relevant conduct.

C. Hypothetical C

Imagine a third case in which the government indicts a defendant, Carter, once again for the attempted laundering of $60,000. In this case, the government alleges all the aggravating factors admitted by Balkin in Hypothetical B. But here, Carter pleads only to the conduct charged in the indictment—$60,000 worth of money laundering. Carter denies any connections to the mob or threats to government informants. He maintains that his scheme was simplistic and that he had no knowledge that the undercover agents were laundering “drug money.”

Essentially, Carter claims that he is just like Ackerman from the first hypothetical—guilty only of attempting to launder $60,000 and subject to a maximum sentence of $y$ months. The government, on the other hand, contends that Carter is like Balkin and is subject to the statutory maximum sentence of

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68. See Section II.D infra for a discussion of the problems with linking the zone of reasonableness to the presumptive Guideline range. Those problems are mitigated in this instance because the defendant has admitted to all the conduct that contributed to the Guideline calculation. It is important to note, however, that the zone of reasonableness need not necessarily overlap with the Guideline range, even where all the facts are admitted by the defendant.

69. For the purposes of the Apprendi-Blakely-Booker analysis, there is no difference between a fact found by a jury and a fact admitted by a defendant. See Blakely v. Washington, 542 U.S. 296, 303 (2004) (“[T]he ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”).
240 months. Assuming the government has proven all the relevant conduct by a preponderance of the evidence, what is the maximum punishment that Carter faces: y months or the statutory maximum 240 months?

The *Apprendi-Blakely-Booker* line of cases provides a clear answer: Carter's maximum sentence is y months, not 240 months. As the Court held in *Blakely*, the constitutional limit on a defendant's sentence is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."\(^7^0\) Recall from the first hypothetical case that when Ackerman admitted to all the conduct charged in the indictment, his maximum sentence was y months in prison (substantially below the statutory maximum of 240 and far below even Balkin's Guideline sentence of 168 to 240 months). Carter has admitted to precisely the same conduct as Ackerman. The jury has not found any additional aggravating factors, nor has Carter admitted any additional aggravating factors. Through the lens of the Sixth Amendment, therefore, these cases are identical: If Ackerman's admissions authorized a maximum sentence of y months, those same admissions must also authorize a maximum sentence of y months for Carter.

Therefore, if an appellate court determined that a sentence above y is reasonable for Carter, it must, as a matter of logic, have relied on facts that were neither found by a jury nor admitted by the defendant, but instead were found by a judge at the sentencing hearing. And *Blakely* and *Booker I* make clear that judicial factfinding that increases the maximum permissible sentence violates the Sixth Amendment.

While it is true that the Guidelines suggest that Carter should receive a sentence of 168 to 210 months, that range exceeds the range of discretion as determined by the facts of conviction, as depicted in Figure 1.3 below.

![Figure 1.3](image)

As Justice Stevens explained in his *Booker* dissent, "judicial factfinding to support an offense level determination" is "unconstitutional when that finding raises the sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant."\(^7^1\) Once


\(^7^1\) United States v. Booker, 125 S. Ct. 738, 775 (2005) (Stevens, J., dissenting in part) (emphasis
again, as illustrated in Hypothetical $A$, the facts of conviction establish an upper limit of $y$ months, and this is the limit of what a judge may lawfully impose based on those facts. We can contrast this situation with that of Balkin in the second hypothetical. Balkin’s higher sentence was permissible because Balkin admitted to the aggravating facts (the same would of course be true if those facts were proven to a jury). $^{72}$ But in Hypothetical $C$, Carter contests the government allegations.

One might object that the preceding analysis collides head-on with Booker II, which contemplates broad judicial factfinding to inform a judge’s discretionary sentence within the statutory range. $^{73}$ But this objection is misguided because the trial judge may still make factual findings and use those findings at sentencing; what she may not do is use those facts to go beyond what is authorized by the facts of conviction.

To be concrete, consider again Ackerman’s situation depicted in Figure 1.1.

\[
\begin{array}{c}
0 \quad x \quad 12 \quad 18 \quad y \quad 240 \\
\text{Statutory range} \\
\text{FSG range} \\
\text{``Reasonable'' range}
\end{array}
\]

Figure 1.1

The judge has a fairly broad range of discretion within the “reasonable range”—there is no one “right” sentence based on the facts of the case. As Booker makes clear, judges have wider discretion that they did when the Guidelines were mandatory. But the fact that the Guidelines counsel a relatively low sentence of twelve to eighteen months may influence a judge’s ultimate sentencing decision (indeed, she is required to consider the Guidelines range when determining a final sentence).

Now return to Carter’s situation depicted in Figure 1.3.

\[
\begin{array}{c}
0 \quad x \quad y \quad 168 \quad 210 \quad 240 \\
\text{Statutory range} \\
\text{FSG range} \\
\text{``Reasonable range''}
\end{array}
\]

Figure 1.3

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$^{72}$ See Blakely, 542 U.S. at 303.

$^{73}$ See Booker, 125 S. Ct. at 760-61 (Breyer, J.).
The "reasonable range" is the same as it was for Ackerman because the facts of conviction are the same. Here however, the Guidelines call for a sentence of 168 to 210 months. A judge would likely use this information to impose a sentence of \( y \) months—the maximum punishment permitted based on the facts of conviction. Because the sentencing judge is operating within the \( x \)-to-\( y \) zone of discretion, she may safely assign a sentence of \( y \) months on the basis of conduct that is not proven to a jury or admitted by the defendant, without running afoul of the Sixth Amendment.\(^{74}\)

This scenario is analogous to the pre-Booker situation in which the Guideline sentence exceeded the statutory maximum for the offense of conviction. In order to comply with \textit{Apprendi}, a court in that situation would sentence the defendant to the statutory maximum because that is the constitutional upper limit. Here, the top of the "reasonableness range" is the upper limit, and a court may not exceed it no matter what the Guidelines calculation yields. Thus, a trial judge can be faithful to \textit{Booker II}'s requirements of making factual findings and consulting the Guidelines, while also remaining faithful to \textit{Booker I}'s bedrock principle that only the facts of conviction may determine the maximum potential punishment—not the facts of conviction, plus other conduct proven by preponderance at sentencing.

One might also object to this analysis on the ground that appellate determinations of reasonableness fall beyond the scope of Sixth Amendment protections—that they are simply not relevant limits under the \textit{Apprendi-Booker} line of cases. Justice Breyer, who has attempted to roll back \textit{Apprendi} at every available opportunity, makes this very claim in his \textit{Booker} dissent. While conceding a central premise of this Note, namely, that "[r]ead literally, \textit{Blakely}'s language would include within \textit{Apprendi}'s strictures . . . appellate court decisions delineating the limits of the legally "reasonable,""\(^{75}\) he cursorily concludes that these limits "of course would fall outside \textit{Blakely}'s scope."\(^{76}\) Yet he offers no persuasive reason why this should be the case. He argues that appellate decisions regarding reasonableness are not within the scope of \textit{Blakely} because "they are not legislative efforts to create limits."\(^{77}\) But this claim cannot be correct because it directly contradicts \textit{Booker I}. After all, although appellate decisions are not legislative limits on judicial discretion, "neither are the Guidelines,"\(^{78}\) as Justice Breyer concedes. Rather, the Guidelines themselves are the creation of an agency within the \textit{judicial branch}.\(^{79}\) In any event, the importance Justice Breyer places on how we label a

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74. See \textit{Booker}, 125 S. Ct. at 750 (Stevens, J.).
75. \textit{Booker}, 125 S. Ct. at 806 (Breyer, J., dissenting in part).
76. \textit{Id}.
77. \textit{Id}.
78. \textit{Id}.
particular limitation is misplaced. Recall that *Booker I* held that the Guidelines violated the Sixth Amendment precisely because they imposed substantive limits on judicial discretion.\(^8^0\) Where that limit originated—be it the legislative branch, the judicial branch, or even the executive branch—was immaterial to the *Booker I* analysis. Mandatory Guidelines, although not legislative efforts, were unconstitutional because they violated a defendant’s right to have all facts essential to punishment proven to a jury beyond a reasonable doubt.\(^8^1\)

Moreover, Justice Breyer’s claim swims against the tide of the *Apprendi* line of cases, which have demonstrated that any enforceable limitation on judicial discretion is what determines the relevant penalty range for constitutional purposes. Recall that in *Apprendi*, the Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”\(^8^2\) Just two Terms later, in *Ring v. Arizona*, the Court elaborated, explaining that when a sentencing court makes any “increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.”\(^8^3\) This formulation of the *Apprendi* principle was significant because it removed emphasis from the “statutory maximum” and indicated that any limitation on the punishment authorized by the jury’s verdict was the relevant limit for constitutional purposes. In *Blakely v. Washington*,\(^8^4\) the Court encountered a penalty ceiling defined not by the underlying criminal statute, but by a state sentencing guidelines regime. Once again, the *Apprendi* principle was expanded and applied to this new limitation. What had been stated in concurring opinions in previous cases\(^8^5\) became the centerpiece of the *Blakely* majority opinion: “[T]he

\(^{80}\) See id. at 750 (Stevens, J.) (arguing in his majority opinion that “[b]ecause [the Guidelines] are binding on judges, we have consistently held that the Guidelines have the force and effect of laws”). An analogous argument can be made regarding appellate limits on sentencing discretion—limits that are also “binding on judges.”

\(^{81}\) Justice Scalia, among others, recognized the constitutional implications of appellate decisions on “reasonableness.” He noted, for instance, that “any system which held it \textit{per se} unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the court today holds unconstitutional.” *Booker*, 125 S. Ct. 794 (Scalia, J., dissenting in part). Thus judicial limits on punishment, regardless of whether the Guidelines themselves are binding, can raise Sixth Amendment problems.

\(^{82}\) *Apprendi* v. New Jersey, 530 U.S. 466, 490 (2000).

\(^{83}\) 536 U.S. 584, 602 (2002). The Court found it impermissible for a trial judge to determine the presence or absence of aggravating factors required by Arizona law for imposition of the death penalty, following a jury verdict for a capital crime. \textit{id}. at 588-89.

\(^{84}\) 542 U.S. 296 (2004).

\(^{85}\) See, e.g., *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (stating that the Sixth Amendment jury trial right “has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment \textit{must be} found by the jury”); \textit{id}. at 501 (Thomas, J., concurring) (stating that “every fact that is by law a basis for imposing or increasing punishment” must be proven to a jury beyond a reasonable doubt or admitted by the defendant).
‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* This rule is a sweeping one that is “not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.” And of course, *Booker* defeated the mandatory provisions of the Guidelines, despite the fact that these limitations on judicial discretion were created by an administrative agency formally located within the judicial branch.

This discussion underscores the fundamental tension between the *Booker I* and *Booker II* majority opinions. As noted earlier, nine Justices agreed that making the Guidelines advisory solved the Sixth Amendment problem only because the Guidelines would no longer cabin judicial discretion within the statutory penalty range. The fact that reasonableness review presents a substantive limit on discretion—a limit that I argue must be based on the simple facts of conviction—changes the Sixth Amendment calculus. To the degree that a sentencing judge has discretion within the statutory range, there is no Sixth Amendment problem; but to the degree that “reasonableness” cabins discretion, the Sixth Amendment problem resurfaces. But Justice Breyer seems to want it both ways: a Guideline regime that is “advisory,” but appellate enforcement of the Sentencing Guidelines to reduce disparity. These visions are not necessarily incompatible, but where reasonableness cabins judicial discretion, the Sixth Amendment cannot be ignored.

### D. The Relationship Between the Guidelines and Reasonableness

Some courts have failed to see that the reasonable range must be determined based solely on the facts of the conviction. Instead they have linked the reasonable range directly to the Guidelines range—a range which is based not only on the facts of conviction but also on facts proven by a mere preponderance of the evidence. In doing so, these courts have committed constitutional error. For instance, the Fifth Circuit, in its first opinion addressing *Booker*, held that “[i]f the sentencing judge exercises her discretion

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86. *Blakely*, 542 U.S. at 303.
88. *See* *Booker*, 125 S. Ct. at 752 (“In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance.”); *see also* Mistretta v. United States, 488 U.S. 361, 412 (1989) (finding that the Sentencing Commission is an “expert body located within the Judicial Branch”).
89. *See supra* note 9 and accompanying text.
90. *See* United States v. Pimental, 367 F. Supp. 2d 143, 154 (D. Mass. 2005) (Gertner, J.) (“We cannot have it both ways: We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important. If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt.”).
to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair" and reasonable sentence. Indeed, when a judge is within the Guideline range, the court will require "little explanation" for the Guideline sentence.

The Fifth Circuit is not alone in taking this approach. While no court has held that a Guideline sentence is per se reasonable (to do so would clearly run afoul of Booker), many have come close, determining that a Guideline sentence requires little explanation and is entitled to a strong presumption of reasonableness. Moreover, no court has yet declared that a sentence within a properly calculated Guideline range is unreasonable.

By letting Guideline calculations (made under the preponderance standard) serve as the baseline for a "reasonable" sentence, the logic of the Fifth Circuit—and those following in its wake—becomes obviously circular. Booker held that mandatory Guidelines based on judicial factfinding were unconstitutional. Thus, the Guidelines were deemed "advisory," and sentences need only be "reasonable." Yet these courts define reasonableness in relation to the Guideline range. Under this definition, the Guidelines, even if not mandatory, continue to constitute predetermined facts that measurably increase the range of potential punishment. The only difference is that rather than increasing the punishment range by a precise amount (as was the case in the old mandatory Guidelines regime), the advisory Guidelines—if deemed presumptively reasonable—increase sentences by an ill-defined amount. If the Fifth Circuit interpretation stands, then all Booker accomplished was to widen the Guideline ranges and blur their formerly bright boundaries. This would

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91. United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) (also noting that "it will be rare for a reviewing court to say such a sentence is 'unreasonable'"). This is similar to the position of the Department of Justice, whose policy is to "actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases." Memorandum from James B. Comey, Deputy Attorney Gen., U.S. Dept. of Justice, to All Federal Prosecutors (Jan. 28, 2005) (on file with the author). But see United States v. Williams, 372 F. Supp. 2d 1335, 1337 (M.D. Fla. 2005) (Presnell, J.) (criticizing the government's position as being "at odds with Booker").

92. Mares, 402 F.3d at 519.

93. See, e.g., United States v. Webb, 403 F.3d 373, 385 n.9 (6th Cir. 2005) (noting that to hold a Guidelines sentence as per se reasonable would violate Booker).

94. See, e.g., United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) (stating that "any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness"); United States v. Mitra, 134 F. App’x 963 (7th Cir. 2005) (finding that a pre-Booker sentence within the properly calculated Guideline range was reasonable, where district judge stated he would have imposed the same sentence in a post-Booker advisory Guideline regime); United States v. Verdinez-Garcia, 134 F. App’x 106, 107 (8th Cir. 2005) (finding that a correctly calculated Guideline sentence was reasonable despite the district judge’s lack of explanation for the sentence).

95. See, e.g., United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005) ("[T]he farther the judge’s sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer . . ."); United States v. Hopkins, 128 F. App’x 51, 56 (10th Cir. 2005) (explaining that "the now-discretionary Guidelines will be a vital barometer of reasonableness on appellate review").
mitigate, but not eliminate, the core constitutional problem with the mandatory Guideline regime.\textsuperscript{96}

We avoid all this constitutional infirmity if we simply return to the core Apprendi-Booker principle: All facts essential to the sentence must be proven to a jury beyond a reasonable doubt. Under Booker, all sentences must be "reasonable." Therefore any fact that is essential to "reasonableness" is also essential to the sentence, and must be proven to a jury beyond a reasonable doubt. If a court bases its "reasonableness" analysis on facts proven to a judge only by a preponderance of the evidence, it violates the Apprendi-Booker rule.

III. APPLYING THE LESSONS OF BOOKER

Thus far, this Note has raised a serious constitutional problem with an important class of cases: those in which contested facts have a substantial impact on the final sentence (i.e., an impact great enough to push the sentence beyond what is reasonable without those facts). The number of cases in this class will depend largely on the meaning of "reasonableness." If reasonableness entails broad zones of discretion, then the class of cases will be relatively small. But if, on the other hand, appellate courts create narrower bands of discretion (perhaps by hewing closely to the Guidelines) the number of cases will be large.

An important limitation in the discussion, however, is that these reasonable ranges remain abstract. There is no simple way around this problem—only time and careful appellate review will bring the upper and lower bounds of reasonable sentences into focus. That said, the remainder of this Note attempts to provide more practical guidance as to how district judges should respond at present, as the common law of sentencing begins to emerge.

First, it is important to note that although the emergence of a common law of "reasonable sentences" for various offenses will be undoubtedly slow, we can nonetheless extrapolate a significant amount of information from even a single appellate court holding of unreasonableness.\textsuperscript{97} This is because an

\textsuperscript{96} The Sixth Circuit recognized this circularity and explicitly rejected such an approach, noting the obvious point that "to hold that a sentence within a proper Guidelines range [as] per-se reasonable . . . is not only inconsistent with the meaning of 'reasonableness,' but is also inconsistent with the Supreme Court's decision in Booker, as such a standard 'would effectively re-institute mandatory adherence to the Guidelines.'" Webb, 403 F.3d at 385 n.9 (citations omitted) (quoting United States v. Crosby, 397 F.3d 103, 115 (2d Cir. 2005)). Instead, the Sixth Circuit found it "prudent to permit a clarification of these concepts to evolve on a case-by-case basis at both the district court and appellate levels." Id. at 383-84.

\textsuperscript{97} Justice Scalia has suggested that this type of review makes sense only when mandatory guidelines provide a benchmark. Otherwise, there is no baseline for assessments of what is reasonable. See United States v. Booker, 125 S. Ct. 738, 794 (2005) (Scalia, J., dissenting in part). While I agree that such determinations are not simple, I am skeptical that the problem is so severe. Over time, case by case, appellate courts will make clear what constitutes a reasonable sentence; perhaps the elusive common law of sentencing will finally bloom.
assessment of reasonableness must be divorced from relevant conduct proven at sentencing. Return, for instance, to the first hypothetical presented in Part II in which Ackerman pleaded guilty only to $60,000 worth of money laundering. If an appellate court determined that a sentence of five years for Ackerman was "unreasonable," it would be clear, first of all, that anyone else who pleads only to money laundering amounting to $60,000 or less is entitled to a sentence of less than five years. This conclusion flows directly from the fact that an appellate holding of unreasonableness, for the reasons described supra, must be based solely on the facts of conviction. Thus, any distinctions among offenders (other than prior convictions) or the manner in which the offense was conducted drop out of the calculus. A judge may consider these factors to determine where to land within the reasonableness range, but none of these factors can justify a sentence of more than five years. Second, although this appellate holding would be formally limited to cases involving $60,000 or less of money laundering, it can serve as a useful guidepost when assessing the sentence of related crimes such as larceny or embezzlement.

This kind of data point, however, has obvious limitations. For instance, even if an appellate court had determined that five years for Ackerman's offense was unreasonable, that determination would not tell a sentencing judge what is reasonable. Moreover, using appellate cases as guideposts is challenging because the facts of conviction will often vary greatly—i.e., the pleas or jury findings before the court may not be helpfully comparable to the available appellate case law. Indeed, in many cases, there may not be any relevant appellate law available. Generally speaking, these problems exist because reasonableness is a standard of appellate review, and is thus inherently backward looking. But district judges must determine ex ante what are "reasonable" sentences for the defendants before them. They know that there is a point beyond which they cannot go, but that precise point is elusive.

The issue then, is what a sentencing judge should do when facing a wide divergence between a sentence that is reasonable based solely on the facts of conviction, and a sentence that is reasonable based on the facts of conviction plus the government's allegations of relevant conduct. A simple prudential rule will help to resolve this constitutional tension:

Where the facts of conviction do not provide a clear guidepost as to the reasonable limit of punishment, a sentencing judge should apply the Fifth and Sixth Amendment protections, requiring either a jury finding or, if the right to a jury trial is waived, proof beyond a reasonable doubt for any contested facts that significantly impact the length of the sentence.

This rule is similar to the rule that District Judge Joseph Bataillon adopted

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98. See Booker, 125 S. Ct. at 756 (Stevens, J.) (stating the Blakely rule with the exception for prior convictions).

99. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2004), applying the same loss table to, inter alia, “Larceny, Embezzlement, and Other Forms of Theft.”

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shortly after Booker was decided, and is rooted in many of the concerns that he raised in United States v. Huerta-Rodriguez.\textsuperscript{100} The rule proposed here, however, provides more flexibility for judicial factfinding at sentencing, and therefore accords better with Booker's remedial opinion.

The rule has two prongs. First, it requires a jury finding for certain aggravating facts. This prong is, of course, rooted in the Sixth Amendment concerns discussed in the preceding Sections. Details of how this requirement could be executed—special verdict forms or bifurcated proceedings, for instance—will be addressed later. Second, in the absence of a jury, the rule calls for proof beyond a reasonable doubt for judicial factfinding at sentencing. This second prong is rooted in the Fifth Amendment’s due process protection. Although Booker itself does not mandate a heightened standard of proof at sentencing, nothing in the decision appears to limit a court’s ability to apply a heightened standard at its own discretion.\textsuperscript{101} I now turn to the due process requirement of proof beyond a reasonable doubt for contested sentencing factors.

\textbf{A. Reconciling the Reasonable Doubt Standard with Booker II}

The right to a jury trial and the right to have accusations proven beyond a reasonable doubt are distinct constitutional rights derived from separate constitutional clauses.\textsuperscript{102} Whereas a defendant’s jury trial right comes from the Sixth Amendment, a defendant’s right to have all elements of a crime proven beyond a reasonable doubt comes from the Court’s gloss on the Fifth Amendment’s Due Process Clause. The seminal decision In re Winship established that in criminal cases, due process requires the prosecution to prove "beyond a reasonable doubt... every fact necessary to constitute the crime with which [the defendant] is charged."\textsuperscript{103} Significantly, Winship applied the "beyond a reasonable doubt" standard in a case that did not involve a jury trial. Indeed, Winship required a judge to apply the heightened standard of proof in

\textsuperscript{100} See 355 F. Supp. 2d 1019, 1027 (D. Neb. 2005) (Bataillon, J.) ("In order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant’s sentence.").

\textsuperscript{101} Booker was decided strictly on Sixth Amendment grounds and did not involve the Fifth Amendment. United States v. Okai, No. 8:05CR19, 2005 U.S. Dist. LEXIS 19096, at *21 n.4 (D. Neb. Aug. 22, 2005) (Bataillon, J.).

\textsuperscript{102} See Booker, 125 S. Ct. at 748 (Stevens, J.) ("It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In re Winship, 397 U.S. 358, 364 (1970). It is equally clear that the 'Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.' United States v. Gaudin, 515 U.S. 506, 511 (1995).")

\textsuperscript{103} In re Winship, 397 U.S. 358, 364 (1970).
order to provide "concrete substance for the presumption of innocence." In short, the Sixth Amendment is concerned with who decides an issue—the judge or the jury. The Fifth Amendment, in this context, is concerned with how that issue is decided—by proof beyond a reasonable doubt or by a more relaxed standard. Although these two constitutional guarantees tend to travel in tandem, they are distinct rights.

As a result, even if a defendant waives his jury trial right, he may not necessarily waive the right to have all essential facts proven beyond a reasonable doubt. This assertion is of crucial importance because the vast majority of federal prosecutions are resolved by guilty or no contest pleas. About 97.1% of all federal sentences are assigned following pleas, with the remaining 2.9% following trials. This disparity is no recent phenomenon, and has persisted despite the Court's expansion of Sixth Amendment and due process rights in cases such as Apprendi and Ring. Even if we expand Sixth Amendment rights further, as I propose, there is little reason to think these statistics will shift dramatically. Prosecutors and defendants will most likely construct more detailed plea agreements that include not only the elements of the indictment but also waivers of jury trial rights relating to aggravating factors as well.

Winship held that the reasonable doubt standard protects more than simply the defendant's liberty interest. The highest standard of proof is "indispensable to command the respect and confidence of the community in applications of the criminal law." The Court viewed the standard not simply as an individual right, which any defendant might waive, but as a transcendent social good, rooted in the importance "in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." Therefore, even if a defendant waives his right to a jury trial (as to the elements or to the essential aggravating facts), he cannot waive both his right and society's interest in having those facts proven beyond a reasonable doubt at sentencing. As one district court put it: "[T]he burden of

104. Id. at 363.


107. During the past decade, the percentage of convictions obtained through pleas has increased from 91.4% in 1996, to 97.1% in 2002. Compare U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 16 tbl.10 (1996), with U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 24 tbl.11 (2002).

108. Winship, 397 U.S. at 364.

109. Id. Moreover, the Court feared that "the moral force of the criminal law [might] be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." Id.
proof is not the defendant’s to waive." 110 This conception of due process is consistent with the Supreme Court’s conclusion (long after Winship) that “[t]he prosecution’s burden to prove every element of the crime is not relieved by a defendant’s tactical decision not to contest an essential element.” 111

Beyond conveying information about societal values, the burden of proof “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” 112 In a civil action where only money is at stake, “we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor.” 113 In criminal actions, however, we believe in general that “it is far worse to convict an innocent man than to let a guilty man go free.” 114 Thus in criminal cases, the social disutility from error is not symmetric; an error in favor of the state is worse than an error in favor of the defendant. We therefore apply proof beyond a reasonable doubt to all elements of conviction. Although the liberty interests at stake are in some sense greater at trial than at sentencing, 115 the interests at stake at sentencing are far from trivial, and the risk of error is significant. It matters quite a bit to a defendant whether he is sentenced to twelve months based on the facts of conviction, or 168 months based on a “bureaucratically prepared, hearsay-riddled presentence report[ ]” 116 that a judge believes is probably correct. 117 It is, after all, precisely this liberty interest that sparked the Apprendi-Blakely-Booker revolution.

Although the Supreme Court has countenanced the preponderance standard at sentencing, 118 the Court has never required the application of that standard. Moreover, neither Congress nor the Sentencing Commission has required the preponderance of the evidence standard. 119 Section 3553(a) states that “[t]he

113. Winship, 397 U.S. at 371 (Harlan, J., concurring).
114. Id. at 372 (Harlan, J., concurring).
115. The Court permits less stringent procedural protections at sentencing primarily because “criminal sentencing takes place only after the defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable doubt standard has been applied to obtain a valid conviction, "the criminal defendant has been constitutionally deprived of his liberty . . . ."” McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1986) (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)).
117. District Judge Joseph Goodwin recognized this risk of error and as a result performed two Guideline calculations—one with facts decided by a preponderance, and one only with facts decided beyond a reasonable doubt. He then used the reasonable doubt calculation to help “weigh the reliability of the advice provided by the Guidelines” and determine how much deference to accord the preponderance calculation. See United States v. Gray, 362 F. Supp. 2d 714, 723-24 (S.D. W.Va. 2005).
118. Whether those cases are viable after Booker is debatable. See infra note 129 and accompanying text.
119. Appellate courts generally have approved the preponderance standard post-Booker. See McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005) (noting that post-Booker, decisions about sentencing factors will continue to be made by judges based on a preponderance of the evidence, “an approach that comports with the sixth amendment so long as the guideline system has some
court, in determining the particular sentence to be imposed, shall consider... any pertinent policy statement issued by the Sentencing Commission.\textsuperscript{120} We find one such policy statement in chapter six of the Guidelines Manual: The commentary to section 6A1.3 states that the Commission believes "that use of a preponderance of the evidence standard is appropriate to meet due process requirements... in resolving disputes regarding application of the guidelines to the facts of a case."\textsuperscript{121} But that same commentary stresses that in each case, the "sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law."\textsuperscript{122} This policy statement seems to leave space for a district judge, at her discretion, to determine that the "appropriate procedure" involves applying a heightened standard of proof for certain aggravating facts. Moreover, this Guideline has not been officially re-examined by Congress since 

\textit{Apprendi, Blakely, and Booker} were decided.\textsuperscript{123} Thus, one should not rely on this commentary for the strong proposition that a heightened standard of proof is impermissible. Finally, Justice Thomas claims that \textit{Booker} "corrects [the] mistaken belief" that the preponderance standard satisfies due process requirements.\textsuperscript{124} Although Justice Thomas was writing in dissent, his assessment adds credibility to the claim that, at the very least, the statute and the Sentencing Commission permit the application of a standard higher than a mere preponderance of the evidence.

\textit{Booker I} went out of its way to limit the reach of precedent that countenanced proof by preponderance at sentencing.\textsuperscript{125} One of these cases was \textit{United States v. Watts}, which held that trial courts may consider acquitted conduct in formulating a sentence; by definition, not all the elements of the previous offense had been proven beyond a reasonable doubt.\textsuperscript{126} Attempting to narrow the scope of that decision, Justice Stevens noted that the Sixth Amendment issue presented in \textit{Booker} "simply was not presented" in \textit{Watts}. In particular, \textit{Watts} "presented a very narrow question regarding the interaction of
the Guidelines with the Double Jeopardy Clause, and did not even have the
benefit of full briefing or oral argument. It is unsurprising that [the Court]
failed to consider fully the issues presented..."127 Perhaps more significant
than Justice Stevens's recasting of this precedent is the simple fact that it—and
others—were all decided before United States v. Jones,128 Apprendi, and
Blakely changed the landscape of federal sentencing. District Judge Nancy
Gertner, for instance, recently concluded that this line of cases, up to and
including Booker, undermines Watts

both by its logic and by its words. It makes absolutely no sense to conclude that the
Sixth Amendment is violated whenever facts essential to sentencing have been
determined by a judge rather than a jury, and also conclude that the fruits of the jury's
efforts can be ignored with impunity by the judge in sentencing.129

Both before and after Booker, some courts have required heightened
standards of proof for certain contested facts at sentencing. Prior to Booker, the
Ninth Circuit held that due process at sentencing may require the heightened
standard of "clear and convincing evidence,"130 or even proof beyond a
reasonable doubt.131 Numerous other circuit courts as well as district courts
have reached the same conclusion with respect to the clear and convincing
evidence standard.132 Although most district courts have held that Booker
preserved that traditional proof-by-preponderance standard at sentencing,133
some have determined that they will use their discretion under Booker to

127. Booker, 125 S. Ct. at 754 n.4.
also United States v. Coleman, 370 F. Supp. 2d 661 (S.D. Ohio 2005) ("This Court believes that all
enhancements should be determined by beyond a reasonable doubt, but, in light of... the multi-circuit
consensus, the Court will continue to review enhancements, with the exception of those relating to
acquitted conduct, by a preponderance of the evidence.") (emphasis added).
130. E.g., United States v. Johansson, 249 F.3d 848, 853-54 (9th Cir. 2001) (discussing
circumstances in which extent of sentence enhancement requires proof by "clear and convincing
evidence" in order to satisfy due process); see also United States v. Restrepo, 946 F.2d 654, 656 n.1 (9th
Cir. 1991) (en banc) (suggesting that clear and convincing evidence might be required for "extreme"
upward adjustments or departures).
131. See United States v. Thomas, 355 F.3d 1191, 1202 (9th Cir. 2004) (discussing the requirement
of proof beyond a reasonable doubt in determining drug quantity at sentencing).
132. Not all courts that have found heightened standards of proof necessary have rooted that
requirement in the Due Process Clause. See, e.g., United States v. Gigante, 94 F.3d 53, 56 (2d Cir. 1996)
("In our view, the preponderance standard is no more than a threshold basis for adjustments and
departures, and the weight of the evidence, at some point along a continuum of sentence severity, should
be considered with regard to both upward adjustments and upward departures."); United States v. Lam
Kwong-Wah, 966 F.2d 682, 688 n.8 (D.C. Cir. 1992); United States v. Trujillo, 959 F.2d 1377, 1382
(7th Cir. 1992); see also United States v. Kikumura, 918 F.2d 1084, 1101-02 (3d Cir. 1990) (holding
that an upward departure due to uncharged conduct should be based on clear and convincing evidence
where the finding had an extraordinary impact on the sentence).
(notting that Booker did not change government's burden of proving enhancements); United States v.
need be proven only by preponderance of evidence and implying that jury verdict or defendant's
admission is not required).
require proof beyond a reasonable doubt in some circumstances.\textsuperscript{134} The grounds for these decisions vary greatly, but the justification that tracks most closely with the thesis of this Note is that of Judge Bataillon in \textit{Huerta-Rodriguez}, which noted that the “court’s discretion is cabined, post-Booker, by the requirement of reasonableness” and therefore “the court cannot sentence a defendant above a reasonable point within a sentencing range without affording procedural protections under the Fifth and Sixth Amendments.”\textsuperscript{135}

There remain some widely read cases often cited for the proposition that proof beyond a reasonable doubt is precluded at sentencing. For instance, the Second Circuit in \textit{United States v. Fatico} stated that permitting the reasonable doubt standard to leak into sentencing hearings would “turn sentencing hearings into second trials.”\textsuperscript{136} But \textit{Fatico}, and similar cases, rest on premises that have since been rejected by \textit{Apprendi} and \textit{Blakely}. \textit{Fatico}, in particular, justifies its holding by claiming that “[t]here is no authority binding upon us which holds that the procedure in proceedings relating solely to punishment, even when an additional fact has to be established, must conform precisely to those in proceedings relating to guilt.”\textsuperscript{137} This is no longer the law. At least with respect to the Fifth and Sixth Amendment protections, certain facts that relate solely to punishment must indeed “conform precisely” to the procedural standards of trial.

\textbf{B. Prudential Concerns}

The two-pronged proposal of expanded jury trial and due process protections at the heart of this Note is, in part, mandated by the Sixth Amendment concerns raised \textit{supra} in Part II and by a somewhat novel application of well-established due process doctrine. But perhaps more significantly, this proposal is also a prudential rule in the sense that it avoids potential unconstitutional action by erring on the side of protecting defendants’ procedural rights. When a judge can determine with confidence where the upper limit of the “reasonable range” of punishment lies (based on prior

\begin{thebibliography}{137}
\bibitem{134} See, e.g., \textit{Pimental}, 367 F. Supp. 2d at 153 (requiring proof beyond a reasonable doubt for acquitted conduct at sentencing); \textit{United States v. Ochoa-Suarez}, No. 03 Cr. 747 (JFK), 2005 U.S. Dist. LEXIS 1667, at *5 (S.D.N.Y. Feb. 7, 2005) (Keenan, J.) (finding that while before \textit{Booker}, the court would have applied the \textit{U.S. Sentencing Guidelines Manual} § 3B1.1 (2004), after \textit{Booker} the court would not apply section 3B1.1 because there had been no finding by a jury beyond a reasonable doubt); \textit{United States v. Huerta-Rodriguez}, 355 F. Supp. 2d 1019, 1027 (D. Neb. 2005) (Bataillon, J.) (“In order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant’s sentence.”); \textit{United States v. Barkley}, 369 F. Supp. 2d 1309, 1317-18 (N.D. Okla. 2005) (Holmes, C.J.) (stating that the court will use its discretion to apply the Guidelines “faithfully” in all cases, “with only such modifications as the Court finds are necessary to satisfy the requirements of the Sixth Amendment articulated in \textit{Blakely}”).
\bibitem{135} \textit{Huerta-Rodriguez}, 355 F. Supp. 2d at 1025.
\bibitem{136} \textit{United States v. Fatico}, 603 F.2d 1053, 1057 (2d Cir. 1979).
\bibitem{137} \textit{Id.} (citation and internal quotation marks omitted).
\end{thebibliography}
appellate case law, for instance), then there will be little risk of constitutional error. In such a case, the judge may consider facts proven by a preponderance of the evidence in choosing a point within the "reasonable range." But when a judge does not know with precision where the upper limit of that range lies, then this Note's proposed rule will call for greater constitutional protections. As Judge Bataillon has noted: "Just as a court should construe a statute to avoid a constitutional infirmity if possible, prudence dictates that the court should adopt sentencing procedures that lessen the potential that a sentence will later be found unconstitutional."

This Note's proposed rule is also firmly rooted in statutory interpretation, to which familiar principles of constitutional avoidance apply. After all, Justice Breyer contends that he did not simply invent reasonableness review. Rather, he deduced the reasonableness standard from the text and structure of the Sentencing Reform Act. Thus, the definition of reasonableness is also a matter of statutory interpretation. If one were to define reasonableness as the Fifth Circuit did (i.e., as dependant on Guideline calculations), this definition would raise a serious constitutional question—a question that was not addressed in Booker, which left ambiguous the definition of reasonableness. It is a cardinal principle of statutory interpretation that if there is "serious doubt" as to a statute's constitutionality, a court must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." As the Court stated in Jones v. United States, "where a statute is susceptible of two constructions, by one which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." Here, reasonableness review creates serious doubt about the ability to sentence defendants based on facts found by a judge and proven by a mere preponderance of the evidence. One way to resolve this doubt is to assume that judges have full discretion within the statutory range. But this reading, as I have argued in Part I, is precluded both by Booker II and by subsequent appellate case law. A better alternative is the one proposed above, where, in certain cases, facts that will have a significant impact on the sentence must be proven to a jury beyond a reasonable doubt, admitted by a defendant, or proven to a judge beyond a reasonable doubt. This is precisely the type of reasoning the Court applied to judicial factfinding in Shepard v. United States.

139. Booker, 125 S. Ct. at 765 (2005) (Breyer, J.). The Court noted that "a statute that does not explicitly set forth a standard of review may nonetheless do so implicitly." Id. (citing Pierce v. Underwood, 487 U.S. 552, 558-60 (1988)).
Sentencing After Booker States.\textsuperscript{142}

This rule, moreover, helps to harmonize the discordant majority opinions in Booker by maintaining fidelity to the bedrock principles of the Apprendi-Blakely line of cases, while at the same time permitting the discretion and flexibility that Justice Breyer's remedial opinion contemplates. The fact that the Fifth and Sixth Amendments provide defendants with distinct constitutional protections only increases the attractiveness of the rule. Even if Justice Breyer's remedial opinion is read to eliminate the Sixth Amendment issue (a proposition I firmly reject), Booker is strictly a Sixth Amendment case—one that did not address due process concerns. Thus, Booker I does not decide any of the due process questions that Booker II's remedy raises.\textsuperscript{143}

Finally, it is important to emphasize that the proposed rule would not require all facts to be proven to a jury or beyond a reasonable doubt at sentencing. The rule applies only to those contested facts that would pierce the reasonable ceiling on punishment for the facts of conviction. Nor would the proposed rule severely upset current sentencing practices. The rule is triggered only where there is a significant difference between the conduct that is charged in the indictment and proven to the jury, and the "relevant conduct" that is alleged in the PSR and proven to the judge.\textsuperscript{144}

Some federal district courts as well as several states already have practices in place that would accommodate this Note's proposed rule. For instance, in the District of Wyoming, Judge Brimmer has relied on juries to make specific findings on special verdict forms to support sentencing enhancements.\textsuperscript{145} Judge Holmes in the Northern District of Oklahoma has created a similar scheme, requiring more detailed indictments, jury findings on all enhancement facts, and, where the jury trial right is waived, proof beyond a reasonable doubt for enhancement facts found at sentencing.\textsuperscript{146} Moreover, since Booker, several states have created innovative solutions to some of the Sixth Amendment problems raised by this Note. Oregon, for example, enacted a law that grants

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  \item[] 142. Shepard v. United States, 125 S. Ct. 1254, 1262-63 (2005) ("The rule of reading statutes to avoid serious risks of unconstitutionality, therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea.") (citation omitted).
  \item[] 143. See supra notes 130-135 and accompanying text.
  \item[] 144. The proposed rule lacks the kind of bright line clarity that the Apprendi line of cases exhibits—indeed, the proposed rule is in some ways a cousin of the murky McMillan v. Pennsylvania rule that a sentencing factor should not become the "tail which wags the dog of the substantive offense." 477 U.S. 79, 88 (1986). But this lack of precision is a necessary byproduct of "reasonableness" review, an appellate standard that "requires courts of appeals to evaluate each sentence individually for reasonableness, rather than apply cookie-cutter standards." United States v. Booker, 125 S. Ct. 738, 794 (2005) (Scalia, J., dissenting in part). Thus, a marriage of Apprendi-Blakely formalism with McMillan's substantive analysis is perhaps the best one can hope for under the circumstances.
  \item[] 145. See United States v. Schuler, 373 F. Supp. 2d 1244, 1248 (D. Wyo. 2005) (noting that "nowhere in the Booker decision does it state that sentencing factors cannot be pleaded and proven to the jury").
\end{itemize}
defendants a right to have aggravating facts proven to a jury. Facts that pertain to the crime (e.g., whether a firearm was present) are decided at the guilt/innocence phase, unless submitting these issues to the jury would be unfairly prejudicial; facts that relate to the defendant’s character are tried in a separate proceeding. Moreover, the prosecutor must either include all enhancement facts in the indictment or provide reasonable written notice of the state’s intent to pursue the enhancement. North Carolina recently enacted similar provisions, effectively “Blakely-izing” their sentencing scheme. Further discussion of the precise mixture of bifurcated proceedings, more detailed indictments, and special verdict forms would be beyond the scope of this Note. These developments do illustrate, however, that this Note’s proposed rule need not be unduly burdensome on the courts—indeed, the best practices are already being developed at both the state and federal levels.

CONCLUSION

Justice O'Connor described Blakely v. Washington as a “No. 10 earthquake.” Booker, then, was the federal “aftershock.” In its immediate aftermath, district courts focused primarily on how much weight to accord the newly “advisory” Guidelines, while appellate courts focused on plain error review. But attention is now shifting towards the meaning of reasonableness under Booker. This Note attempts to provide a foundation for that discussion. The challenge is to reconcile the substantive holding in Booker I with the remedy in Booker II.

This Note argues first that appellate review of sentences will create enforceable common law limits on the reasonable range of punishments for a given offense. Second, it argues that the range of reasonable sentences must be determined by the facts of conviction—not by additional facts found at sentencing. Third, any facts that propel a sentence beyond that range of reasonableness must be proven to a jury, or—in limited circumstances—proven to a judge beyond a reasonable doubt.

These three conclusions flow directly from and are required by Booker I. Booker II, however, contemplates the continued practice of judicial factfinding by a preponderance of the evidence. To reconcile these two opinions, I argue that judges may continue to engage in this kind of factfinding, but they may not

147. 2005 Or. Laws ch. 463 § 3(1).
148. Id. § 3(4).
149. Id. § 4(1).
Sentencing After *Booker*

permit these sentencing facts to propel the sentence beyond what is reasonable without those facts. In cases where the "reasonable" range for a given offense is clear, this task is simple. But where those limits are unclear, I argue that a sentencing judge should resolve constitutional doubt in favor of the defendant and require jury findings for aggravating facts that would significantly increase the "reasonable range" of punishment.

This rule is not required by *Booker*, but it is not prohibited by *Booker*. More significantly, the rule balances the need for flexible judicial sentencing with the bedrock constitutional rights to a jury trial and to have all facts essential to the punishment proven beyond a reasonable doubt.