

Gleeson Sentencing Class Summary

I. Theories of Sentencing

Von Hirsch, “Should Penal Rehabilitation Be Revived?”

- Rehabilitative ethic tends to shift attention from offender’s actual criminal conduct to lifestyle or social/moral character.
- Criminal justice politics determine “humaneness” more than the theory of punishment—rehab isn’t necessarily safer in same unpropitious social setting.
- Rehab criteria rarely correlate to blameworthiness – creates potential fairness problem in using criminal punishment (a blame-conveying response), yet determining its use on variables that don’t relate to the behavior’s reprehensibility.
- If want to scale down sanctions, main reasons should be equity and diminution of suffering. Acting like punishment is palliative can be dangerous.

Bentham, “Punishment and Deterrence”

- Utilitarian theory. All punishment in itself is evil. Should only punish if it promises to exclude some greater evil. Should not be inflicted where it is: (1) Groundless (no mischief to prevent); (2) Inefficacious (cannot prevent the mischief); (3) Unprofitable (would produce more mischief than prevent); (4) Needless (where mischief may be prevented in other ways).
- Individual deterrence achieved three ways: (1) physical incapacity – removing physical power of offending; (2) moral reformation – taking away desire to offend; (3) legal intimidation – making him afraid of offending.
- General deterrence is the true justification of punishment. Rules setting minimum and maximums. Rule 6: In order to treat people similarly, must take individual sensibilities into account, b/c people experience sanctions differently (mutandis mutandis).

Posner, “Optimal Sanctions: Any Upper Limits?”

- Deterrence theory based on “rational calculators.” Set sanctions at level that won’t over-deter at margins, and will allow for rational violations occasionally. Corporal punishment not a strong deterrent- momentary excruciating pain. Setting punishment through prison time is attractive in being one-dimensional (as opposed to prison conditions), and has more variability than pain.
- Combining heavy prison terms with low probability of apprehension serves deterrence purposes, and is not unfair, because ex ante, all costs and benefits are equalized.

Wilson, “Selective Incapacitation”

- Incapacitation is attractive b/c it works by definition: its effects result from physical restraint on offender, not his subjective state (as do deterrence and rehab). Depends on three conditions: (1) some offenders repeaters; (2) removed offenders will not be immediately replaced; (3) prison must not increase post-release criminal activity to off-set crimes prevented by stay in prison.
- Studies show inmates differed sharply in their individual “offense rates.” E.g., juvenile conviction highly probative.

- Selective incapacitation = adjusting prison terms to reflect predicted individual offense rate. E.g., California study: if low-rate robbers got 2-year terms and high-rate robbers got 7-year, number of robberies in state would drop by 20% w/o increasing prison population.
- Issues: (1) whether permissible for crime control to be sentencing policy objective (yes); (2) whether prediction methods are good enough; (3) whether great disparities b/w sentence and charged offense is fair (probably not; would require outer boundaries); (4) whether legal/ethical to consider certain facts as basis for predictions, e.g., race, juvenile record, alcohol/drug use, etc.

Von Hirsch, “Selective Incapacitation: Some Doubts”

- Empirical problems with selective incapacitation:
 - Techniques did not distinguish b/w serious and trivial recidivism
 - High-risk factors could not be identified by data available to courts
 - Cannot extrapolate from incarcerated robbers to robbers at large
 - Studies assumed long criminal careers
- Ethical problem:
 - Conflict with proportionality. Proportionality requires penalties be based chiefly on the gravity of the crime for which the offender stands convicted. Selective risk prediction necessarily shifts emphasis away from seriousness of current offense.
 - Once differential is cabined at limits by proportionality concerns, crime control benefits shrink to very little.

Von Hirsch, “Proportionate Punishments”

- Commensurate deserts: Severity of punishment should be commensurate with the seriousness of the wrong.
- Statutory maxes are rarely relevant b/c so much higher than sentences actually imposed.
- MPC: sentence should not be so low as to “depreciate the seriousness of the offense.”
- Criminal penalties are both unpleasant, and impart blame, i.e., offender is treated as though he deserves the unpleasantness inflicted on him. B/c imparts blame, should only be inflicted to the degree deserved. Whatever the ultimate aim of the criminal sanction (even if truly based on utilitarian aims), punishment still in fact ascribes blame to the person. Hence, should adhere to proportionality.
- Impossible to “balance” objectives of punishment w/o knowing how to balance. Suggestion: commensurate deserts gets prima facie controlling effect: impose commensurate sentence *unless* special reason for deviation.

Morris, “Desert as a Limiting Principle”

- Desert should not be the defining principle, but rather a *limiting* principle.
- Equality principle: treat like cases alike.
- Exemplary punishment (singling someone out for greater punishment to deter) violates equality principle. But no reason to punish 6, when 1 suffices for deterrence. Principles of parsimony overcomes principle of equality. Justice ≠ equality.
- Principle of parsimony limits principle of equality (even if unlimited resources). Thus, equality only acts as a guiding principle, which gives way to countervailing utilitarian concerns.

- Proportionality acts as a limiting principle on punishment, which cannot give way. But proportionality can never be perfectly precise – just a limit.

Kern, “Sentencing Reform in Virginia” (1995)

- Report on sentencing reform in VA to abolish parole and establish truth in sentencing.
- Federal guidelines mandatory and subject to appellate review – viewed as imposition.
- State guidelines voluntary, no appellate review of departures – judges viewed as non-intrusive decision aid that did not restrict judicial discretion.
- Selective incapacitation focus on violent offenders, defined on bases of entire criminal career. Should incapacitate through most of crime-prone years (18-24). Count juy.

Bazelon, “Sentencing by the Numbers” (2005)

- VA has used selective incapacitation model since 2002: predicts future criminality based on short list of factors w/ proven relationship to future risk. Recidivism factors include: male, 20s, unemployed, single.
- May be unconstitutional. Age, sex → suspect EPC classes. Married, holding job → RB, but reflect status and opportunity, as well as preferences.
- Moral hazard problem: offenders w/ low scores realize likely to avoid prison; greater incentive to commit more crimes.
- May be rational policy for state facing limited resources.

II. Sentencing Reform Movement and Federal Sentencing

Frankel, “Lawlessness in Sentencing” (1972)

- Prof:
 - Frankel is genesis of sentencing guidelines. Most people agreed w/ him. Total lawlessness. E.g., drug couriers that swallowed balloons of heroin— indistinguishable from each other. Only difference is judge. 6 months vs. 15 years. (parole blunted down to 5 years). Virtually unlimited discretion, no appellate review. Unexpressed preferences based on unexpressed views. Intolerable.
- Argues for creating a detailed sentencing code.
 - No laws, rules constraining sentencing. Statutory sentencing ranges are huge. Do not instruct judge how to pick w/in it. Not overstatement to say uncontrolled power vested in judges, parole, and probation agencies is the greatest degree over liberty of human beings that one can find in the legal system.
 - The giving of reasons helps a decisionmaker himself in effort to be fair and rational, and makes it possible for others to just whether succeeded. But no requirement in the announcement of a prison sentence.
 - Should codify sentencing criteria b/c now exist in arbitrary, random, inconsistent, and unspoken fashion. Cries out for policy judgments. Will make explicit and uniform what is not tacit, capricious, decisive. Defining of concrete issues would also allow for meaningful appellate review.
- Fairly detailed calculus of sentencing factors:
 - Unavoidable struggle b/w relying on identifiable facts and workability.
 - Step 1: Classify sentence in accord w/ basis purpose (e.g., retributive, deterrence, etc.) Figure this out FIRST.
 - Step 2: Code enumerates particular factors of mitigation or aggravation. Numbers can be meaningful even if cannot be perfectly precise.
 - Step 3: Grid/chart with overall “score.” Even if crass or mechanical, preferable to the void. Nowhere else do we fetishize vagueness. Should only dismiss numbers, scores after, not before, trying them out.
 - Final proposal: Establish national commission charged w/ (1) study of sentencing; (2) formulation of law/rules from the study; (3) enactment of rules subject to congressional veto. Task requires continuous attention of respected agency.
- “Sentencing today is a wasteland in the law.”

Sentencing Reform Act (28 U.S.C. §§ 991-998) (1984)

- § 991(a) : Establish U.S.S.C.
 - 7 voting members, 1 nonvoting member.
 - No more than 3 federal judges (used to be “at least 3” – Congress in Nov. 2008 tried to change it back)
 - AG is nonvoting member
 - No representative for defense (unbalanced)
- § 991(b): Purposes of Commission
 - (b)(1)(A): guidelines should satisfy the goals of sentencing (§3553(a)(2));

- (b)(1)(B): provide certainty and fairness; avoid unwarranted sentencing disparities (not defined). What makes disparity unwarranted? Geography?
- § 994: Guts of instructions from Congress to Comm'n
 - (a)(2): promulgate policy statements (equivalent force of law as Guidelines)
 - (a)(3): promulgate guidelines for revocation too (huge # of inmates due to parole revocation).
 - (b)(2): 25% rule → mechanism to restrict discretion. (Max of guideline range shall not exceed min of guideline range by more than 25% or 6 months.)
 - (c) Shall consider whether certain matters have any relevance to sentence: (1) grade of offense; (2) circumstances of offense; (3) harm caused (not just D's behavior); (4)-(6) community concern (local community). → suggests that disparities due to geography not unwarranted (but ignored; Comm'n thinks disparities due to geography are warranted).
 - (d) Shall consider relevance of list of factors: age, education, vocational skills, etc.
 - (e) general inappropriateness of considering education, vocational skills, employment, family, responsibilities, community ties. INCONSISTENT w/ (d)! Legislative compromise.
 - Compromise: people who wanted to consider the above offender characteristics gave them up so that guidelines would only consider past convictions, not arrests. But false compromise—b/c arrests still on table for purposes of upward departure. People that gave up offender characteristics got taken.
 - (g) Consider prison capacity.
 - No fiscal restraint at federal level. States can better restrict- have to balance budget, legislature must make choices about bang for buck.
 - (i) Recidivism-based enhancements
 - (j) Presumption of probation for nonviolent first offender.
 - Note: Interpreted differently by Comm'n!
 - (k) Life sentence inappropriate for rehab or education → no longer true.
 - § 3553(a) requires considering needed education/vocation.
 - (l)(2) general inappropriateness of imposing consecutive terms for conspiracy and underlying crime. → rare thing that is good for Ds!
 - (m) want to get harsher
 - (n) Take substantial assistance into account
 - (o) Comm'n ongoing, must consider data
 - (s) Must consider petitions from Ds re suggested changes to guidelines under which sentenced
- § 995: Start of data collection → one of the best parts of SRA.
- B/w § 994 and § 995: 50 pgs of statutes
 - SRA goal: distance Comm'n from Congress – stick to the experts.
 - But instead: all these congressional directives – meddling!
 - One-way ratchet – never ask for lower sentences. Comm'n plays submissive, secondary role now.
- Socio-economic status mostly out of bounds

- Both sides though had been used impermissibly. If judge could envision playing golf w/ D, lower sentence. Or: too liberal on poor.
- Can sort of consider education and work history.

Guidelines Manual, Ch. 1, Part A (first promulgated 1987)

- Widely believed Breyer wrote most of introduction.
- § 3553(b)(1) – excised by Booker – no longer mandatory.
- Abolishes parole (and creates good time). Creates certainty → but lose “second look” by parole commission. (Big price of certainty.)
- Objectives: honesty in sentencing; uniformity; proportionality. Tension b/w uniformity/workability and proportionality.
- Adopted empirical approach to solve philosophical “sentencing theory” problem.
- 10,000 pre-guideline sentences examined.
- P. 5 – Comm’n did not adopt the averages. “Rather it departed from the data at different points for various reasons.
 - (1) War on Drugs – ratcheted up guidelines for drug crimes to match mandatory minimums (otherwise would look anomalous). Note: Comm’n has never divulged their data calculation re how much the mandatory minimums differ from the averages, but it is significant. Further, used to divide by 3 b/c of parole.
 - Prof: Explosion in prison population can be traced directly to this decision. 3x what it was when Guidelines introduced. Comm’n’s 15-year report did not discuss why extended them. Too bad.
 - (2) White collar crime ratcheted up.
- Real Offense v. Charged Offense
 - Initially sought to develop pure real offense system. (Pre-guidelines was essentially pure real offense system). Breyer favors taking into account how crime was committed.
 - But workability problem: limit # of moving parts.
 - Charged offense system allows P to affect policy – very vulnerable to P’s tinkering.
 - Comm’n chose modified real offense system → charge offense system that contains significant number of real offense elements. Implemented through § 1B1.3 Relevant Conduct. Includes uncharged and acquitted conduct.
- Departure Power
 - Comm’n intends sentencing courts to treat each guideline as carving out a “heartland”: set of typical cases embodying the conduct described by guideline.
 - Can depart only if find “aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”
 - Some factors may not be considered, e.g., 5H and some 5K2 factors.
 - Otherwise, which factors justify departure w/in judge’s discretion.
 - No clear indication how regular – p. 7: “they will not do so very often,” and “unusual cases,” etc. But no hint how broad power really is.
 - Must give reason and reviewable
 - In 2003, Congress limited. Thought 18% was too high, no good reason.
- Plea Agreements
 - Comm’n decided to make no major changes in practice.

- Probation and Split Sentences
 - White Collar Crimes—too much probation pre-Guidelines. Now deemed “serious.” i.e., lose presumption of probation under § 994(j).
 - Note: B/w ratcheting up the drug laws and the white collar, § 994(j) presumption of probation is effectively gone.
 - Note: Almost none of the pre-guideline averages were actually adopted! (in spite of language to that effect.)
- Guidelines reduced trials → more guilty pleas
 - Surprising – everyone thought trials would increase b/c little concession for guilty plea and get creamed if guilty.
 - In fact, system turned Ps from investigators/lawyers into sentencers. Now only 2% of Ds go to trial.
 - Easier to get consensus on sentencing policy in states – good testing ground.

Breyer, “Key Compromises” (1988)

- Federal vs. State Guidelines
 - Federal criminal code has many more crimes than state.
 - Easier to achieve political consensus in state b/c greater homogeneity.
- Congress’s Objectives
 - Truth in sentencing (abolish parole; limited 54 days of good time/year).
 - Reduce unwarranted sentencing disparity
- Principles guiding Commission
 - Empirical basis – by and large followed typical past practice
 - Evolutionary process – collect data, revise over time.
- Compromises
 - Real Offense vs. Charge Offense (Procedural vs. Substantive Justice)
 - Charge offense – tends to overlook that particular crimes may be committed in different ways.
 - Real offense – requires post-trial factfinding (b/c D can’t both argue innocence and reduced quantity of drugs); post-trial procedures more informal, less fair, unwieldy; but if require full blown jury, unmanageable.
 - Compromise: Must have some real elements, but not so many that it becomes unwieldy or procedurally unfair.
 - Base offense level – determined by charged offense.
 - Offense characteristics – determined by “real” conduct.
 - Offender characteristics – “real,” determined by past record.
 - Uniformity vs. Proportionality (Administrability)
 - Uniformity: treat similar cases alike.
 - Proportionality: tailor punishment to blameworthiness.
 - The more proportionality factors → the less manageable system.
 - Further, “punishment is more of a blunderbuss than a laser beam.” No reason to make fine-grained distinctions b/w criminal behaviors when so little is known about the precise effects of punishment.
 - Comm’n limited # of offense categories; leave flexibility in departures.
 - Underlying Theory of Punishment
 - “Just deserts” – too subjective; Comm’n can’t agree on rankings of crimes.

- Deterrence – not enough data for fine-grained distinctions.
 - Compromise: Adopt past practice.
- Offender Characteristics
 - Some wanted arrest records considered as aggravating.
 - Others wanted age, employment, etc. as mitigating.
 - Compromise: Adopt previous practice by Parole Comm'n: look primarily to past records of convictions. Do not take formal account of past arrests or drug use, or other offender characteristics Congress suggested considering.
- White Collar Crime
 - Comm'n decided to require short but certain imprisonment for white collar offenders, including tax, etc. who previously only received probation.
 - Reasons: (1) unfair that white collar criminals only got probation, but not other offenses of comparable severity; (2) short but certain prison provides more deterrence.
- Intractable Sentencing Problems, e.g., multiple counts
 - Multiple counts: Warrant more severe punishment, but not linearly.
 - Choice of concurrent vs. consecutive results in almost unbounded discretion, undermining goal of greater uniformity.
 - Solution: additional counts warrant additional punishment, but in progressively diminishing amounts.
 - Process:
 - (1) Inchoate + completed → collapse
 - (2) Fungible items → sum together
 - (3) Other multiple counts: (1) separate into separate events; (2) add up scores.
 - Highly approximate solution. But better than nothing or wholly arbitrary.
- Endemic Problems (e.g., guilty pleas)
 - Past practice: guilty plea → 30-40% reduction.
 - But explicit guideline reduction would mean insisting on trial means higher sentence.
 - Solution: Acceptance of responsibility → leave to discretion of judge.
 - Plea bargaining:
 - Changed past practice only slightly.
 - Require P and D to accurately state facts for judge. May accept plea agreement outside of guideline range if “justifiable” reasons for doing so (note: changed later!).

Fraser, “Sentencing Guidelines in Minnesota” (1999)

- 17 states + federal use guidelines.
- Permanent sentencing comm'n now seen as essential component of guidelines.
- Abolition of parole is not seen as essential to guidelines in states
- Effective appellate review is found in less than half of state guidelines.
- About half attempt to regulate intermediate sanctions (i.e., b/w prison and probation).
- “Limiting retributivism”: retributive theory sets upper and lower bounds (many states).
- Goals which have evolved:

- Truth in sentencing (e.g., federal limit of 15% for good time)
- Public safety – prior record insignificant to retribution; consideration goes more to rehab & incapacitation.
- Rehabilitation
- Restorative/Community Justice – greater attention to crime victims, communities.
- Rewarding guilty pleas and cooperation – basis for departure
- Broadly-shared sentencing power
- Simplicity
- Federal vis-à-vis States
 - Resource management: States can use guidelines to avoid prison overcrowding; w/o that goal, federal prison population has grown 9%/yr.
 - Abolition of parole works better in system w/ guidelines (b/c lose second look but can better control disparity, reduced sentence length, and resources on front end).
 - Problems w/ federal: (1) active appellate review (lose needed flexibility); (2) no resource-management goal; (3) limited intermediate sanctions; (4) uncharged or acquitted conduct is ONLY in federal (NO state system permits non-conviction offense factors to play substantial role); (5) severe mandatory minimums; (6) NOT simple.
 - Federal’s “relevant conduct” approach is lawless – goes too far in effort to avoid prosecutorial power to allow sentences based on weak charges that were properly dismissed, acquitted or never brought.
- No reason to go back to indeterminate sentencing – cannot be justified in modern system of justice governed by rule of law.
- State guidelines have succeeded in improving sentencing policy and practice, reducing bias and disparity, avoiding prison over-crowding, and reserving prison space for most serious offenders.

III. Departure Power and the PROTECT Act

Federal Sentencing Statistics (FY 2006)

- Total downward departures (not for cooperation): 18.3%.
- But 5 immigration districts account for most (border courts: fast-track, volume discount).
- If disaggregate data, nowhere near 18%.
- Comm'n could have avoided Protect Act by changing heartland for immigration cases; then they wouldn't have shown up as departures; Congress would not have seen large figures.

PROTECT Act

- Congress directly amended Guidelines. Huge slap in the face to Comm'n.
- Departures no longer very relevant after Booker. This act is bug-in-the-amber now.
- Section (l): Report by AG
 - Required report for EVERY case w/ downward departure (10,000 in 2001!).
 - Must describe case, reveal ID of judge, give court's reasons, etc.
 - Then another report for every appeal (only 19 in 2001—almost nothing).
 - Congress was mad at the judges and the AG who was acquiescing.
 - Note: reporting requirements never took effect. DOJ adopted policy instead.
- Also changed standard of review to de novo (overrode Koon – abuse of discretion).

DOJ Policy Memo (July 28, 2003)

- Amended US Attorneys' Manual.
- USAOs must report to DOJ certain adverse decisions, including (7)(b) bases for departure has become prevalent in district or w/ particular judge.
- USAOs have affirmative obligation to oppose any sentencing adjustments, including downward departures (p. 3). (Before, USAOs would “collude” – indicate not oppose or appeal.)

Judiciary Year-End Report 2003 (Chief Justice's response to PROTECT)

- Rare criticism of Congress by SCOTUS.
- Main message: slow down. You should have consulted us.
- Departure power is very important, this act is too harsh. On its face, greatly limits departure power, and in spirit (reprimanding judges) eliminates it entirely.

USSC Report to Congress re Downward Departures (Oct. 2003)

- Meekly suggested that Protect Act unnecessary – take account of immigration cases.
 - E.g., p. 38: downward departures for immigration increased 1,171%.
- Revised § 5K2.0. Used to be fairly simple. Changes:
 - Eliminate downward departures for sex offenders.
 - Divides departures into kinds not adequately taken into consideration.
 - Further divides into considerations not mentioned. Message: not that many left anymore!
 - Departures based on circs to a degree not taken into consideration → main point: should be rare, exceptional, unusual.
- Statement of reasons

- After Protect Act, must give Statement of Reasons to depart.
- Prof thinks post-Booker, Rita, Nelson, guidelines no longer even presumptively reasonable → requiring statement of reasons not to impose guideline sentence is illegal.
- Note: No judges do this. Just deviate from range through 3553(a) factors.
- Comm'n has institutional bias to make their sentences matter- be as relevant as possible.
- Generally:
 - If Comm'n got it right, should be equal number of downward & upward departures, b/c aggravating as often as mitigating.
 - Even w/o immigration cases, 10 to 1 ratio of downward to upward departures.
 - Upshot: Comm'n never even got close to heartland (if judges' opinions matter at all).

Guidelines Manual, Ch. 5, Parts H and K

- § 5H – general inappropriateness of certain factors.
- § 5K – identified circumstances that may warrant departure.

IV. Constitutional Limits on Sentence Enhancements

Types of Sentencing Factors:

- **Mandatory Minimums → OK** (e.g., McMillan, Harris).
 - But infirm. Majority of court thinks Apprendi logically inconsistent w/ McMillan/Harris. Harris got 5 votes b/c Breyer unwilling to accept Apprendi.
- **Enhanced Maximums** (e.g., Apprendi, Almendarez-Torres)
 - **Based on recidivism → OK** (Almendarez-Torres)
 - Paradigmatic sentencing factor; plus already found BRD in previous trial
 - But may be infirm. Thomas was one of 5, but now wants to overturn it (see Apprendi concurrence).
 - **Any other factors → GONE** (Apprendi).
 - Any (non-recidivism) fact increasing max is an element of crime.
 - **Mixture →** Some seem mixed b/w these two. E.g., NY statute: enhanced sentence based on: persistent felony offender; also finding that history and characteristics warrant increased sentence.
- **Structured Sentencing Regimes**
 - **Mandatory Guidelines → GONE** (Booker, Blakely)
 - **Advisory Guidelines → OK** (Booker).
 - But be wary: If adopt pragmatic approach to baseline, then advisory guidelines from which no one deviates could be considered functionally mandatory).

U.S. v. Watts (1997)

- Double Jeopardy issue → off the table, no longer an issue.
- Holding: Sentence enhancement for acquitted conduct does not raise DJ issue, b/c not punishment for the acquitted offense; rather, an enhancement of punishment for the convicted offense for the *manner* in which it was committed.
- Note: Rationale more convincing for “possessing a gun” enhancement than for amassing drug deals that are months apart (though both are “relevant conduct” under Guidelines).
- Stevens, dissent: § 3661 has always allowed judge to consider uncharged or acquitted conduct; but used to be optional, at discretion stage. Now, *mandatory*, and ratches up the guideline range itself. Stevens thinks this conduct should only come in at point of selecting sentence w/in the range.
- Uncharged/acquitted conduct worry:
 - Can result in tail wagging dog – charge low-level offense, get big sentence couldn’t have proved; effectively lowers standard of proof. Not a NEW problem—but guidelines make apparent.
 - Acquitted conduct – at least judge saw real evidence at trial.
 - Uncharged – can rely on total junk evidence.

McMillan (1996)

- Mandatory minimums don’t trigger 6A problem. Baseline is formal, not pragmatic.
- Note: Afortiori, mitigating factors found by judge don’t trigger 6A problem either.
- Note: pre-Apprendi.
- Factors: no effort for tail to wag the dog; not clear effort to subvert Winship.

Mullaney/Patterson

- Defer to legislature to define sentencing factors w/in limits. One limit: tail not wag dog.

Almendarez-Torres (1998) (Breyer)

- Illegal re-entry conviction. Past felony conviction increased max from 2 to 20 years.
- Holding: Recidivism can be mere sentencing factor; does not raise 6A concerns.
- Only rationale that withstands Appendi: paradigmatic sentencing factor. Also, less problematic from jury right standpoint b/c already found guilty BRD.
- Turns McMillan on head: McMillan said raising min isn't as bad as raising max. Breyer here says permissive increased max isn't so bad as mandatory increased min.

Jones (1999)

- Statutory construction case
- Dicta: FN 6: Principle animating constitutional doubt was 5A DP and notice and jury trial right of 6A requires that any fact that increases max penalty is an element that must be included in indictment, submitted to jury, found beyond reasonable doubt.

Appendi v. New Jersey (2000) (Stevens)

- Hate crime enhancement of 2 yrs, on top of 10 yr max of 2 concurrent sentences.
- **Holding: Other than fact of prior conviction, any fact that increases penalty for crime beyond statutory maximum must be submitted to jury and proved beyond reasonable doubt.**
- Limits Almendarez-Torres: Despite Breyer's broad language in A-T, now limited to a single unique exception (recidivism only, as "traditional" factor).
- Head fake: Judges have historically exercised discretion in range prescribed by statute. → Leads judges to think baseline is statutory max, not guidelines. Blakely changes this!
- Thomas (concur): Wants to change vote on A-T → now thinks wrong.
- Scalia (concur): Idea of notice: criminal should never get more punishment than bargained for when did the crime, as determined BRD by jury; if gets anything less, "thank the mercy of a tenderhearted judge."
- O'Connor (dissent): Thinks they've overruled McMillan.
- Breyer (dissent): Need compromises—too many relevant facts to put to jury.

Harris v. U.S. (2002) (Kennedy)

- Upholds mandatory minimums 5-4. McMillan survives Appendi.
- Holding: Mandatory minimums do not violate 6A.
- Rationale: Distinction b/w mandatory and permissive. D is assured not to get more than max. Anything less is due to mercy of judge (from Scalia's concurrence in Appendi).
- "If facts judges consider when exercising discretion w/in the statutory range are not elements, they do not become as much merely b/c legislatures require the judge to impose a minimum sentence when those facts are found." "Congress simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the precise weight to be given that factor."
- "The minimum may be imposed w/ or w/o the factual finding; the finding is by definition not "essential" to the D's punishment."

- O'Connor (concur): Disagrees w/ Apprendi. But even if accept Apprendi, agrees w/ court.
- Breyer (concur): Finds Apprendi indistinguishable. Only concurs b/c still rejects Apprendi.
- Thomas (dissent): Apprendi and McMillan cannot be reconciled. Would overrule McMillan.
 - The fact that D brandished firearm indisputably later the prescribed range of penalties to which he is exposed.
 - “As a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards.”
 - Thomas’s interpretation of Apprendi rule: “When a fact exposes a D to greater punishment than what is otherwise legally prescribed, that fact is by definition an element of a separate legal offense. Whether one raises the floor or raises the ceiling it is impossible to dispute that the D is exposed to greater punishment than is otherwise prescribed.

AZ v. Ring

- Extends Apprendi. If judge has to find aggravating facts to impose death, violates 6A.

Blakely v. Washington (2004) (Scalia)

- Holding: “The relevant statutory maximum is ... the maximum he may impose without any additional findings.”
- Upshot: Mandatory guideline range is the effective statutory max. Baseline is whatever judge *could* have sentenced based on jury’s verdict alone, w/o additional fact-findings. (Formalistic).
- “When a judge inflicts punishment that a jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.”
- Distinguish McMillan: Authority to impose sentence must come from jury—mandatory minimum is already in authorized range.
- Dissent: Accuses of formalism. If state creates baselines, get punished. If eliminate baselines, total discretion, rewarded. Preferred rule: Defer to legislature w/in limits.
- After Blakely: Chaos. W/in 21 days, three way split on federal guidelines: 5th Cir: OK; 7th Cir.: Unconstitutional; 2d Cir.: Tried to certify question to SCOTUS.
 - a) Booker: Mandatory federal guidelines violate Apprendi/6A. Breyer’s solution: Make advisory.

United States v. Booker (2005) (J. Stevens/J. Breyer) – federal sentencing guidelines

- Rule (Stevens, 5-4): Statutory max is the max authorized by jury’s fact-findings.
- Remedy (Breyer, 5-4): Make guidelines advisory. Excise the mandatory language.
 - § 3553(b)(1) → eliminated.
 - Sentences reviewed for reasonableness, i.e., “abuse of discretion.” → no more de novo review.
 - ALL the guidelines are advisory, not just departures (b/c specific offense characteristics, § 3 adjustments, etc. all could increase guideline range above max authorized by jury findings alone).

- Other alternatives (no party advocated for Breyer’s solution!):
 - Blakely-ize guidelines – add jury fact-finding requirement.
 - Throw out guidelines.
 - Topless guidelines (Frank Bowman): downward depart constrained by guidelines; but no upward limit, all the way to statutory max.
- Irony: SRA designed to constrain judge power; SCOTUS objected b/c gave judges too much 6A power (intruded on jury); solution: give judges more discretion and power! Now don’t even have to find facts to enhance sentences outside range.
- Guidelines are still followed exactly. Congress never had to respond to Booker.
- Post-Booker process:
 - (1) Determine range.
 - (2) Determine departures.
 - (3) Decide whether to sentence pursuant to post-Booker power.

Cunningham v. California (2007) (Ginsburg)

- California determinate sentencing law (DSL) w/ 3-tiered sentencing regime.
- Holding: Violates Apprendi.
- Rationale: Ginsburg digs through California laws and court rules to conclude judge must make a fact-finding to impose the upper-term sentence. Therefore, Blakely ax falls.
- Alito (dissent): California regime is indistinguishable from advisory federal guidelines. Reasonableness review necessitates judge fact-finding.
- Cal regime:
 - Must find “circumstance in aggravation” which can include anything at all, even sentencing policy; reviewed for reasonableness.
 - Only difference b/w Cal and federal is that Cal is explicit, while fed is implicit.
- Federal:
 - Booker remedial holding altered holding of Blakely, i.e., that max = max could be imposed solely on basis of acts reflected in jury verdict.
 - Blakely max is “the least onerous” sentence you could impose for the bare statutory elements found by jury, i.e., when offense and offender are as little deserving of punishment as imaginable.
 - But Booker’s reasonableness review necessarily supposes some sentences will be unreasonable in absence of additional facts justifying them. Thus anticipates that imposition of sentences above this level may be conditioned on findings of fact made by judge not jury.
 - “Reasonableness review imposes a very real constraint on a judge’s ability to sentence across the full statutory range w/o finding some aggravating fact.”

V. Post-Booker Role of Federal Guidelines

§ 3553

- § 3553(a) Factors to be considered in sentencing (sentence sufficient but not greater than necessary to comply w/ factors set forth here): ← parsimony requirement
 - (1) Nature and circumstances of offense and history and characteristics of D;
 - (2) The need for the sentence to reflect:
 - Just deserts
 - Deterrence
 - Incapacitation
 - Rehab
 - (3) Kinds of sentences;
 - (4) Sentencing range (i.e., Guidelines); ← one factor only!
 - (5) Policy statements;
 - (6) Need to avoid unwarranted disparities;
 - (7) Need to provide restitution to any victims.
- § 3553(b)(1): Excised by Booker → Court shall impose sentence of a kind and within the range of the Guidelines unless departure power.

Post-Booker:

- Statutory max now = statutory max.
- Even if judge does same thing post-Booker as pre-Booker, it's constitutional b/c technically empowered to impose that sentence, even w/o the finding.
- “Reasonableness” review
 - Supplanted “de novo” review of Protect Act.
 - De facto same system? If “reasonableness” means must make factual findings to justify sentence, and those findings’ reasonableness is determined by guidelines, effectively the same thing.
 - “Reasonable” is only a prudential requirement cabining discretion – does not mean violates 8A.

Post-Booker Process:

- Calculate the range.
- Then step back, consider all § 3553(a) factors.
- Cannot presume reasonableness of guidelines range. (Though OK as starting point.)
- Adequately explain reasons.

Rita v. U.S. (2007) (Breyer)

- Holding: Upholds 4th Cir.’s prudential rule of presumption of reasonableness on appeal if trial judge sentences w/in guideline range.
 - Note: Creates safe harbor for judges – if sentence w/in range, upheld.
- BUT: Sentencing judge may not use presumption of reasonableness. AND: not a presumption of unreasonableness if outside guidelines.
- Reasoning:

- 6A question is only “whether the law forbids a judge to increase a defendant’s sentence unless the judge finds facts that the jury did not find (and the offender did not concede).” Here, nothing was forbidden.
- Sentence w/in guidelines demonstrates that both judge and Sentencing Comm’n agree on the right sentence. OK to presume it’s reasonable.
- Scalia (concur): Can only have procedural review. Moment you have substantive appellate review, get pulled right back into 6A problem. (Only Scalia believes this.) Must ensure that judge-found facts are NEVER legally necessary to a sentence. Any substantive review will always result in some fact being necessary to a sentence. Anytime you reverse a sentence as unreasonable, that’s a cue in the next case that you must find X fact in order to make it reasonable → leads right back down the path to Apprendi.
- Stevens (concurr): I hope judges will now recognize the Guidelines are truly advisory. Thinks Souter overstates the gravitational pull of the Guidelines.
- Souter (dissenting): Gives nice summary of background. Talks about gravitational pull of Guideline range. Making guidelines advisory creates either: (1) return to wide disuniformity; or (2) presumption for the guidelines that undermines Apprendi. Presumption is inconsistent with Apprendi and 6A. Only Congress can cure by Blakely-izing the guidelines.
- Note: Souter is right about gravitational pull! FY 2008 stats show no change in sentencing after Kimbrough and Gall. Once Rita tells judges they have a safe harbor from reversal, pull is too strong.

Kimbrough v. U.S. (2007) (Ginsburg)

- Limited Holding: Not unreasonable to consider disproportionate crack ratio of guidelines to conclude guidelines yield “greater than necessary” sentence to achieve 3553(a) purposes, even in mine-run case.
- Broader Holding: Not unreasonable to sentence outside range based on disagreement w/ categorical policy judgment in the Guidelines.
 - But: May be limited to circumstances where Comm’n themselves do not endorse.
- Trial judge gets greater deference if decision w/in his institutional competence:
 - If find case falls outside heartland → deference (ability to comprehend individualized case before him).
 - If base variation on view that range fails to reflect § 3553 factors even in mine-run of cases → closer review. (Suggests Kimbrough doesn’t carry as much hope for Ds as might think.)
- Thomas (dissent): Still disagrees w/ Booker remedy.
- Alito (dissent): Remand in light of Booker’s holding that appellate courts may not treat the Guidelines’ policy decisions as binding.

Gall v. U.S. (2007) (Stevens)

- Holding: Abuse of discretion review applies equally to all sentences, whether w/in or outside range. Rejects proportionality review of 8th Cir.
- Reasoning:
 - Requiring stronger reasons based on percentage of departure looks like presumption of reasonableness → bad.
 - Plus, math formulas are bad, b/c probation will always be 100%.
- Upshot of this case:

- Sentencing range is just one factor in the sentencing calculus—doesn't get significant weight.
- BUT: This case is SO distinguishable (b/c Gall is such a perfect boy scout), that judges will resist this. Not as good for Ds as it could have been.
- Method for trial court:
 - Calculate guidelines.
 - Consider 3553(a) factors.
 - Adequately explain reasons for sentence.
- Review by appellate court:
 - Procedural review: Must compute guidelines correctly.
 - Substantive review: Abuse of discretion. (Must give deference).
- Scalia: Acquiesces to Rita (though would prefer only procedural review). Prefers SCOTUS to 8th Cir. b/c will lead to fewer reversals (and it's the reversals that lead to the 6A problem).
- Souter: Wants to Blakely-ize the Guidelines
- Alito: Thinks must give "significant weight" to the Guidelines.
- Thomas: Rejects Booker—still thinks Guidelines are mandatory.

Nelson v. U.S. (2009) (Per Curiam)

- Holding: Trial judge may not use presumption of reasonableness.
- Reversed, b/c plain from sentencing judge's comments applied presumption: "unless there's a good reason in the 3553 factors, the Guidelines sentence is the reasonable sentence."
- BUT: this is what courts are doing.

VI. Sentencing to Reward Cooperation with Law Enforcement

§ 3553(e)

- Get out of mandatory minimum.
- File parallel motion with § 5K1.1 motion.

Guidelines Manual, §5K1.1

- “Upon motion of the government....”
 - In post-Booker world, judge can confer leniency w/o motion from government. But hardly happens.
- Motion must state that D “has provided substantial assistance.”
 - This meaning was revised by Amendment 290.
- Gets D out of guidelines. (File parallel § 3553(e) motion to get out of mandatory min.)
- No structure for determining how much judge should take off. Whatever they want.

Amendment 290 (1989)

- Section 5K1.1 is amended by deleting "made a good faith effort to provide" and inserting in lieu thereof "provided". Section 5K1.1(a) is amended in the first sentence by deleting "conduct" immediately following "of the following".
- (Policy Statement) Reason for Amendment: The purpose of this amendment is to clarify the Commission’s intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance. The amendment also makes an editorial correction.
- Effective Date: The effective date of this amendment is November 1, 1989.
 - Prior to amendment: only required “made a good faith effort to provide.”
 - Mere effort or willingness WAS enough.
 - This amendment changes policy/philosophy as guise of “clarification.”
 - This is no way to make sentencing policy. Agency should have taken comments, heard from prosecutors, and at least debated these important issues.
 - Affects law enforcement and offender characteristics.
 - Law Enforcement
 - Makes lenience depend on facts outside D’s control—results-based approach. Impairs law enforcement if Ds become more reticent.
 - Counter: Judge Wood in Milken: If a good faith effort is enough, then everyone will just give little phony efforts—won’t produce the kind of results the system needs.
 - Offender Characteristics
 - D has turned over new leaf. Moreso than just accepting responsibility. Now won’t even be able to go back to old neighborhood, old crew, b/c has turned.

Cooperation Agreements

- ¶ 3: D will provide truthful, complete and accurate info and will cooperate fully w/ Office. D’s obligations
 - (a) To be fully debriefed and attend all meetings.

- Hugely important. Reason prosecution prefers these agreements to immunity.
 - Alternative: Get D to plea guilty. Then immunize them. Then coerce the testimony. Then can get the info w/o making an assistance motion.
 - But: Prosecutors want this requirement to be fully debriefed and attend all meetings. Want to know EVERYTHING witness could possibly say before the witness is crossed.
 - (b) Furnish all documents
 - (c) Not to reveal cooperation or info
 - (d) Agrees to testify anywhere
 - (e) Consents to adjournments of his sentence
 - Prosecutor will do anything to delay D's sentencing until they have milked him for all the testimony they need.
- Terms of agreement depend on:
 - How useful the D's info is
 - Other crimes D has committed – need to get D to tell you about those crimes, b/c (1) might not sign him up, b/c don't want murderer on stand; (2) might sign him up but w/ worse terms; (3) “coverage” – no charges will be brought for heretofore disclosed activity.
- ¶ 4: ... No criminal charges will be brought against D for _____.
 - Proffer precedes Cooperation Agreement. Try to create incentive to clean out all skeletons in closet. Cooperation Agreement provides “coverage” for all crimes revealed by time of signing—will be taken into account at sentencing, but can't be charged with later.
 - How do you get D to reveal crimes you don't know about? Coverage – if you reveal now, your deal will be a little worse; but will protect from prosecution later; will get it over with now, and won't get hit that hard. Crimes cheaper by the dozen. Note: This is not immunity b/c court can consider all those acts in sentencing. Just “coverage.”
 - Note: These tend to be contracts of adhesion.
- ¶ 5 – always agree to be debriefed w/o presence of counsel
 - Response to case (Ming He) where D lied during debriefing but didn't have attorney present who would have “woodshedded” him and quickly rectified the error. D still received 5K motion, but wasn't as favorable as he wanted. 2d Circuit sided with D; said needed to have attorney present. ¶ 5 deals with this.
 - Note: Incentive for Ds to say whatever they think prosecutor wants to hear.
 - Then: Add 2d Circuit rule that need to have lawyer there to make sure D says the right thing.
 - Danger: Prosecutor, lawyer, D all working together to make sure Prosecutor's theory comes out.
 - E.g., Was A at the murder? No. You sure about that? → tells the D to say “yes.” Not always intentional.
- ¶ 6 – Prosecutors contractually reserve right to make good faith assessment of D's breach and value. Meaning: Prosecutor could be dead wrong about D's cooperation, and still lawfully withhold 5K motion, so long as in good faith – and D is stuck with that assessment.

- Response to Brechner. Prosecutor has institutional advantage vis-à-vis for determining value of the cooperation.
- But also gets to determine: “otherwise comply with terms of agreement” → which includes not committing any more crimes.
 - Judge is just as qualified to do that!
 - E.g., prisoner smuggles in deli meat to prison – judge is just as able to weigh the relevance of that crime, as compared to his substantial assistance.
- Here, P gets to decide not to bring motion at all.
 - P is given the key to sentencing leniency.
- No inquiry into P’s good faith unless first make substantial threshold showing. Then D could raise issue on appeal to say motion was wrongfully withheld. Rare. Not quite as rare as Wade motions (unconstitutional motive), but still rare.
- ¶ 6: “If the Office determines that the defendant has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) with the sentencing Court setting forth the nature and extent of his cooperation. Such a motion will permit the Court, in its discretion, to impose a sentence below the applicable Sentencing Guidelines range and also below any applicable mandatory minimum sentence. In this connection, it is understood that a good faith determination by the Office as to whether the defendant has cooperated fully and provided substantial assistance and has otherwise complied with the terms of this agreement, and the Office’s good faith assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon him.”
- ¶ 7: D can’t say he won his case after pleading guilty (Hyde Amendment) as a way of accusing P of bad faith.
 - Right after signing – go straight to court and plead guilty. Don’t want them to be able to walk away. Want fact that they pled guilty hanging over their head.
- ¶ 8: Breach provision
 - Must give complete, truthful, accurate info and testimony; no more crimes.
 - If D tells the thinnest lie, gets totally screwed. Guilty plea still stands, but gets no mercy; prosecute to the fullest.
 - But government will often be forgiving—they always mess up somehow. But disingenuous when suggest while operating as witness that contract has perfectly guaranteed that he can only speak truths.
 - Note: Other D won’t downplay either, b/c makes counter-argument that D will fabricate b/c facing life if doesn’t produce conviction.
- D faces much higher range w/ faulty cooperation than if just pled guilty w/o cooperation.
 - Better to have D facing maximum punishment if mess up. Enables P to better sell D as a witness—makes him plead guilty to ALL of it, cook up huge facts for PSR.
 - If not cooperation, P will just want to cut a deal to dispose of case. Fewer charges, will limit info in PSR, etc.
 - Counsel to D: Better off with guideline range for life +5K, or 15-yr guideline, w/o 5K? Will depend on how much reward you get for cooperating.
- Guidelines increased P’s power, helped w/ investigations:

- Before: couldn't quantify what was in it for D.
- After: If I convict you, you are in this box. ONLY way out is to cooperate.
- Note: Post-Booker 2d Cir. now says judge must consider non-5K1.1 cooperation (i.e., if D cooperated, but P refused 5K motion.)
- **Different Meanings of Proffer:**
 - Cooperation Proffer
 - To cooperate, first meeting is “proffer” – tell everything, gov't decides whether to sign you up.
 - Safety Valve Proffer
 - To beat mandatory minimum, must do “safety valve proffer” – test is whether divulged everything you've done (relevant conduct); court is ultimate decision-maker, by preponderance.
 - Have to admit to conduct that may not otherwise have been proved by preponderance. Creates risk of higher guideline range, even if get out from under mandatory minimum.

USSC Data re Substantial Assistance Departures

- FY 2006: 14.4% 5K1.1 departures.
- FY 2007: 14.4 % 5K1.1 departures.
- FY 2008: 13.5% 5K1.1 departures.
- Big Ticket Cooperation Cases for Ds: (Table 30, 2008 numbers)
 - Drug Trafficking: 6,000 5K motions – 44.4% median decrease
 - Fraud: 1,000 5K motions – 70% median decrease
 - Antitrust: small number of cases – but 100% decrease (do no time at all)

Wade v. U.S. (U.S. 1992)

- 3553(e) gives statutory authority for prosecution to make substantial assistance motions.
- Wade assists prosecution – but never received an agreement from prosecution to make motion if his assistance bore fruit. Prosecution leaves him hanging. Doesn't file motion.
- Rule: Absent unconstitutional motive for failure to file substantial assistance motion (e.g., race, religion), out of luck. There is rationality requirement, but not irrational for prosecutors to make cost-benefit analysis. (Rational basis review: entitled to relief if P's refusal was not rationally related to any legitimate government end.)
 - Cost: lesser punishment for this D.
 - Benefit: value of that cooperation, and future cooperation.
- Institutionally, prosecutors are in best position to make this determination—better at weighing these factors than judge.

U.S. v. Brechner (2d Cir. 1996)

- Cooperates. Year of taped meetings w/ corrupt bank officer. But lies at debriefing. Quickly corrected, no detrimental reliance. Admits there were other kickbacks to other people. AUSA gives him “fresh start.”
- Gov't says won't make motion b/c will be difficult to prosecute bank officer where Brechner is the sole witness.

- RULE: Limit on prosecutor's power where there is agreement: implied duty of good faith to honor agreement. Also, more searching scrutiny of unconstitutional motive if there is an actual agreement.
- BUT: One lie is enough for denial of 5K1.1 motion to be in GF.

Campo (2d Cir. 1998)

- Judge insists that AUSA tell him how much of a break to give; AUSA refuses.
 - AUSA won't make a recommendation, b/c helps AUSA sell the witness.
- RULE: Judge must consider 5K1.1 motion; can't condition break on AUSA giving you a number.
 - In this unusual case where judge has expressly indicated his refusal to exercise the discretion accorded him by law, this refusal constitutes an appealable error of law.
- But Gleeson feels sympathy now for the judge – feels information-starved.

U.S. v. Milken (SDNY 1992)

- Grants Rule 35 motion for reduction in sentence, partially b/c of cooperation.
- Responds to objections to cooperation reductions: (1) judge becomes arm of prosecutor; (2) benefits the worst criminals, b/c they know the most; (3) basing leniency on results provides incentive to fabricate and is unfair when D's GF efforts don't produce conviction; (4) punishment no longer fits crime; (5) undercuts deterrence function of punishment.
- Judge's response:
 - (1) judge evaluates independent factors of D, e.g., how onerous for him.
 - (2) concedes this point. But need to incentivize maximal info-giving. If a little kernel of info provided same reward, then everyone will just give little phony efforts—won't produce the kind of results the system needs.
 - (3) does not require conviction
 - (4) cooperation indicates new leaf, and new attitude toward prior associates
 - (5) cooperation helps law enforcement, increases risk of detection- deterrence.

VII. Plea Bargaining Under The Guidelines

Data: Currently, 96.3% of all federal Ds have pled guilty.

Guidelines Manual, Ch. 6, Part B

- § 6B1.2(a): Judge may accept charge bargain agreement (Rule 11(c)(1)(A)) if determines remaining charges adequately reflect the seriousness of the actual offense behavior.
 - Note: No one uses this. Outside core mission of USSC. Plus, neither P nor D wants to bring it to judge's attention.
 - Comm'n (w/o statutory mandate) sought to cabin prosecutorial discretion to charge bargain. Also sought to have judge be police, to make sure charge bargain doesn't undermine guidelines. This effort has utterly failed. This has been the case since the beginning of the guidelines.
- § 6B1.2(b)-(c): Can accept recommended (Rule 11(c)(1)(B)) or agreed sentences (Rule 11(c)(1)(C)) if sentence is either w/in range, or departs for "justifiable reasons."
 - Previously: Plea agreement itself was a justifiable reason.
 - Amendment 295 (1989): Defined "justifiable reasons" to only those that would justify a departure under the guidelines.
 - Prohibited judges from accepting bargain for sentence that could not be reached through departure power. Could only accept (c)(1)(C) bargain if could get there w/o the bargain.
 - Reflected huge normative choice by USSC: To subject prosecutorial disparities to same tight regulation as judicial disparities.
 - Didn't render bargains entirely useless (b/c can agree to a departure judge wouldn't otherwise find) – but can only have a sentence bargain to the extent you can reach that through departure power. This has never been followed.
 - But there are some cases. Mostly cases where judge has for some reason rejected the plea. In this context, the judges sometimes cite 6B1.2.

Fed. R. Crim. P. 11

- Rule of criminal procedure that governs entry of guilt plea. Amended in 1970s to make more transparent.
- Types of Pleas:
 - (c)(1)(A): Charge Bargain – gov't will not bring, or move to dismiss, other charges.
 - Binding if court accepts. Requires judicial approval. Can withdraw if judge doesn't approve.
 - This is most common.
 - (c)(1)(B): Sentence Bargain – gov't will recommend particular sentence or range.
 - Not binding on court. No right to withdraw plea if court deviates.
 - But P can stand up in court and say certain facts "aren't readily provable." Can also insist on factual stipulation.
 - (c)(1)(C): Agreed-Upon Sentence – gov't will agree that specific sentence or range is the appropriate disposition of case.
 - Binding on court if accepts agreement. Requires judicial approval. Can withdraw if judge doesn't approve.

- Caselaw/practice allows parties to agree to a cap under (c)(1)(C) too.
- Note: Ps reluctant to do (c)(1)(C) b/c overtly sentencing. Worry will have to do same thing for D2 and D3.... Takes a ton of time to get right.
- Note: Most common plea bargains are none of these! Just agreements, not pursuant to Rule 11 at all. Rule 11 just says parties may agree. Doesn't say what else they may agree to.
 - Cap on sentence achieved through opaque manner (the transparent way is prohibited by the guidelines). Will decide on what they'll say they can prove. After they've already reached the end result of the estimated sentence.
 - But if it's a charge bargain, then it's (c)(1)(A). (But note: Court will not explicitly accept charge bargain, pursuant to § 6B1.2(a). Will just implicitly accept by dismissing charges.)
- (d) Withdrawing Plea: May withdraw plea:
 - (1) before court accepts w/o reason
 - (2) after court accepts plea, but before imposes sentence if: court rejects the plea agreement, or D can show fair and just reason for withdrawal.
- (e) After court imposes sentence, may not withdraw guilty plea.

U.S.S.G. § 5K2.21 - Dismissed and Uncharged Conduct

- Amended in 2000. Resolved circuit split. Allows courts to consider all conduct at sentencing, even that dismissed or not charged as part of plea agreement in the case.

EDNY Standard Plea Agreement

- Can plead guilty w/o an agreement. Why agreements?
- For Ps:
 - Conserve resources – often conditioned on taking b/f motions.
 - Information – D can help convict w/ info only he knows.
 - Risk aversion – provide guaranteed conviction.
 - Cooperation – can help convict others.
 - Restitution to Victims – sort out what happened (esp. in white collar sphere).
 - Protect victim from trauma of testifying.
 - Sympathy for D.
- For Ds (P's bargaining chips):
 - Mandatory minimums – can plead to offense w/o mandatory minimum.
 - Fact bargaining – can present the facts in a way that will produce an estimated range. Except in 2 courtrooms, that estimated range operates as a cap (says Peter). W/o agreement, P can hold to all the facts.
 - Additional charges – stop the bleeding b/f P finds more stuff.
 - Both sides can bargain away opportunities to seek departures; Ps to seek upward variance from range; Ds can bargain away right to seek downward adjustment from range.

Gleeson, “Role of Courts in Policing Sentence Bargains”

- Sentence bargains: 6B1.2: can accept if departs from guideline range for justifiable reasons. Defines justifiable reason in round-about way to equal departure.

- 1989 Amendment – devious, stealthy policy change, in the guise of “clarification.” Doesn’t even amend the guidelines; just the commentary.
- In spite of Comm’n saying they would leave plea bargaining where it was, Commentary said could only accept if sentence could be reached through the departure power.
- Trying to place identical constraints on prosecutorial power.
- Issue: Extent to which Guidelines, which were created to restrict judicial discretion, should become mechanism to restrict prosecutorial discretion as well.
- DOJ’s policy for sentence bargains exactly mirrors commentary for 6B1.2.
- Adversarial system- hard to ask judge to reject outcome that both sides think is just.
- Sentence bargains are none of the Comm’n’s business.
- SRA was meant to correct unwarranted disparities produced by judges’ discretion, not prosecutors. Plea bargains were untouched b/c disparities weren’t unwarranted.
- SRA cannot reasonably be viewed as mandate to Comm’n to rein in prosecutorial discretion.
- Very same reasons that we grant Ps power to decline to prosecute (expertise in assessing strength of case, interest in resource allocation, superior ability to weigh crime control implications) also counsel in favor of allowing bargaining for lesser sentences.
- “Fast track” dispositions of immigration encouraged by Congress and Comm’n—create clear disparities in name of resource allocation.
- Sentence bargains today help to lighten sentencing regime that is too harsh. Plus, no need to worry about too much leniency. Ps – who already have power to grant absolute leniency by not charging – are least likely to go overboard.
- Comm’n’s rule forces opaque obfuscation.
- Comm’n should revoke Amendment, and make clear revised policy statement that Ps subject to review by sentencing court have power to engage in sentence bargaining, and court approval will be freely given.

DOJ Policy (Ashcroft, Sept. 22, 2003)

- Rule: Federal Ps must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.
- The most serious offenses are those that generate the most substantial sentence under the Guidelines.
- A charge is not readily provable if P has GF doubt as to gov’t’s ability readily to prove a charge at trial.
- Any sentencing recommendation made by the U.S. must honestly reflect the totality or seriousness of the D’s conduct and must be fully consistent w/ the Guidelines and applicable statutes and with the readily provable facts about the D’s history and conduct.
- If readily provable facts are relevant to guidelines calculations, P must disclose them to court, including Probation Office. May not fact bargain.
- Ps may not simply stand silent when a downward departure motion is made by D.

VIII. Sentencing Options; Alternatives to Incarceration

Guidelines Manual, Ch. 5, Parts A-F

- Sentencing options laid out in Chapter 5. All of this is operative, despite guidelines being advisory.
- § 5C1.1: Imposition of Imprisonment
 - “A sentence conforms with the guidelines if...”
 - Criticism that Booker never appears in guidelines. No acknowledgement in guidelines that no longer mandatory.
 - Zones of sentencing table are very important to practitioners. Most of the bargaining relates to getting into a different zone.
 - B/c 5C1.1 ascribes great significance to zone re whether go to jail or not.
 - Zone A: Imprisonment not required unless applicable guideline requires (doesn't know of any guideline that does that). Don't have to go to jail.
 - Zone B: bottom of range is greater than zero → but can substitute entire sentence with intermittent confinement, community confinement, home detention for the otherwise prescribed jail term.
 - Day for day. One day jail = one day in these other things.
 - Community confinement = halfway house.
 - Intermittent = e.g., weekends.
 - Zone C → must go to jail for at least half of minimum. Rest can be substituted for the substitute options.
- § 5C1.2: Safety Valve
 - This is only for drug offenses.
 - Can get relief from mandatory minimum.
 - But can't do better than a Level 17.
 - Parallel provision in 3553(f) statute: cooperation is operative there → will get out from mandatory minimum in all cases (not just drug).
- § 5D1.1: Supervised Release
 - This is parallel to probation, but after a jail term. Important part of sentencing picture. Many people are in jail b/c of violations of supervised release. So easy to go back in, especially for drug abusers. Using drugs violates supervised release.
 - Must be imposed if someone gets more than year in jail. Almost always imposed no matter what.
 - § 5D1.2 – gives the authorized terms.
 - § 5D1.3 – elaborate conditions. Note: Ds told very little about the conditions, even at sentencing. Categories:
 - Many mandatory conditions.
 - Other conditions reasonably related to D and offense.
 - Standard conditions. (uniformly imposed)
 - Special conditions. (frequently imposed)
 - Additional conditions.
 - Revocation hearings happen ALL the time, and allegations of violations of supervision. Many times a week in Prof's court.

- Ds go from sentencing proceeding to meeting with probation officer – then go over the list of conditions. Must do it well w/ standard conditions. B/c never absence of notice allegation.
- To challenge conditions
 - Hearing in district court (either at outset, or upon violation).
 - Can only appeal upon finding of violation based on that condition.
 - Sometimes could get an audience on direct appeal. (But must preserve objection on record.) But many waive right to appeal. More often comes up when trying to live under the conditions.
- Chapter 7 – violations of supervision.
 - Officer exercises discretion about when to bring violation to judge's attention. Has discretion about remedies. Can agree w/ probation officer w/o counsel. Generates ton of re-entries back into jail.
 - Prosecutor falls out of the picture at this stage.
 - Role of probation officer is ambiguous – deliberately so.
 - When plea guilty to supervision violation, Rule 11 doesn't apply – no colloquy. Even though going to jail. B/c now in different setting. Officer wears two hats: (1) protect community/law enforcement; (2) but also help D stay on straight and narrow (paternalistic). Creates watered-down rights for offender. Officer operates in netherworld w/ potentially punitive element, but explicit rehabilitative goal. And D lawyers not around. Lawyers present at violation proceeding. But agreements are just struck b/w supervising officer and offender.
 - When alleged violation occurs, might be denied. Defense lawyer advocates for offender.
- § 5E: Restitution
 - Must be ordered. Restitution Act requires restitution in just about every case.
 - Restitution is different from loss:
 - Restitution can only be ordered w/r/t offense of conviction.
 - Strategic point for D: Only plead guilty to counts away from those that would provide restitution to victims.
 - Different from loss computation: which would include all relevant conduct.
 - Restitution is different from fine:
 - Restitution must be imposed irrespective of ability to pay.
 - Unlike a fine.
 - Must determine who the victim is. No restitution if no identifiable victim (e.g., drug crimes).
 - Procedures in 3663 and 3664.
 - Victims can make affidavits of loss. They can be challenged.
 - Judge must consider ability to pay in terms of restitution, e.g., whether it must be immediate. E.g., pay % of net monthly income after get out of jail. Becomes condition of supervision. Special condition: own up to financial obligations.
 - This can result of violation of supervision.

- Fines not imposed if D meets burden of demonstrating inability to pay. Most Ds make.
 - Judicial compliance w/ Crime Victim Rights Act not great.
 - Require victim to submit affidavit to prove really out the money.
 - Often it's a credit card company—don't pursue.
 - Crime Victims Rights Act
 - Has shifted civil remedies into criminal. Criminal cases have never been on behalf of victim. Has always been a healthy distance. That has been narrowed by CVRA.
 - Brings civil claims into criminal court.
 - High-end fraud cases w/ wealthy Ds – can get really involved.
- § 5E1.2: Fines
 - Fines are low. Comm'n against substituting fine for jail.
 - Prof has increased fines, esp. where decreases jail time.
- § 5E1.3: Special Assessments
 - Goes into victims and witnesses fund.
 - Only financial punishment that D will ALWAYS suffer.
- § 5E1.4: Forfeiture
 - Mostly driven by statute. Historically in rem. Some now in personam (which looks very similar to fine, though can attack assets differently).
 - Rarely done criminally – often civilly or administratively. Easier burden of proof. Helps office funding.
 - Criminally, it appears as a separate count in indictment.
- § 5E1.5: Costs of prosecution
 - Rarely see this.

Incarceration Stats

Alternative Sentencing in the Federal Criminal Justice System, U.S. Sentencing Commission (2009)

IX. Supervision of Offenders

Guidelines Manual, Ch. 7

- Guidelines for sentencing for violations.
- Violations
 - Often raised by supervising officer in quasi law enforcement role.
 - Judge doesn't have to revoke for every violation. But some mandatory: drugs, firearms. (even there, flexibility).
 - As general matter, judge can continue supervision, modify supervision, or revocation – send back to jail; then judge can impose another period of supervision on back-end of new jail term.
 - Can create revolving door character of offenders.
- Due Process concerns
 - Requires notice and opportunity to be heard.
 - But opportunity to be heard is significantly watered down.
 - Judge need only be reasonably satisfied that violation occurred (i.e., only by preponderance).
 - Hearsay admissible, and often offered.
 - No requirement of new Pre-Sentence Report.
 - Will create just a supplement to the PSR.
- Hybrid relationship b/w the offender and the system while on supervision:
 - Paternalistic/best interests of offender/Rehab approach.
 - Law Enforcement dimension.
- **Rules for sentencing after revocation (from 1994 2d Cir. case)** **Judges felt free to deviate from guidelines in revocation setting, even before Booker**
 - Must consider guidelines
 - Must be w/in statutory max
 - Must be reasonable
 - Must consider 3553(a) factors
- Must consider: what are we punishing at revocation stage? Two models:
 - (1) Underlying conduct – in which case, if already punished by state, might not seem right to punish again in federal.
 - (2) Violation as breach of trust w/ court – violation of trust in putting offender back in community.
- Which model you choose has huge effect on what you do when offender has already served time for the offense.
 - Amply punished on retributive model.
 - Ch. 7 and ch. 5 – recommend consecutive time (i.e., additional time) for the revocation, even if already punished for underlying conduct in state court.
 - 5G: Suggests same thing: independent punishment for the violation.
 - Troubling if D has already been clobbered by state.
 - Not b/c no breach of trust. But offender obviously experiences as additional punishment for the underlying conduct.
 - Judge will generally calibrate downward if got handled harshly in state court.
- For first offense, guidelines take into account if punished in state court – glimmer of humanity for Ds.

Travis, “Managing Prisoner Re-entry”

- Huge sentences if don't plea out.
- A lot of those people are coming out now.
- More than 70% have addiction problems.
- Model for supervised release: probation officer says if you don't do X or Y, I'll take you to court.
- Drug courts model: Judge is the one that says if you don't do X, I'll put you in jail.
- Pendulum swinging back:
 - Drug courts and re-entry courts that we see now are an effort to legitimize a shallow effort to pretend we're not in the supervision stage.
 - Judges aren't social workers; don't know anything about drug treatment; anomalous for judge to pretend to be rehab professional.
 - Devices where judge is checking in each month, and demanding offender to take methadone or else go to jail – puts judge in position where pretend to be expert where really not.
 - Others think it's a good system, and helps.
 - Drug court and re-entry court is designed to pretend that we aren't returning to rehab model. B/c have judge there w/ a gavel.
 - But this is the rage. New re-entry court on EDNY. Instead of dealing w/ probation officer, come to chambers.

X. Crime Victims' Rights

Crime Victims' Rights Act (2004)

- 4.5 yr old legislation. Striking statute that transformed procedural rights of victims.
- Judiciary doesn't follow very well.
- Provides 8 rights for crime victims:
 - Right to be reasonably protected from accused (this is not a substantive addition—protections were already there) – gives participation right;
 - Right to reasonable, accurate, timely notice of any proceeding;
 - Right not to be excluded from any such public proceeding (except sequestration provision) – note: not affirmative right to attend, b/c some victims are in jail;
 - Right to be reasonably heard at any public proceeding in district court regarding release (even on day of arrest), plea, others.
 - This right is at issue in Kenna case – added oomph – it's a right to actually speak. Note: Not a right to be heard at trial.
 - Victim gets right to speak in court at bond hearing! Already assumes there is a victim, assumes crime committed, and gives right to be heard. Huge tension w/ presumption of innocence.
 - Bail Reform Act maintained cognizance of presumption of innocence. Not here.
 - Victims don't often come to bail hearing. But can.
 - Right to confer with gov't attorney in case.
 - Less effect on judicial proceedings. But large effect on prosecution.
 - Must confer w/ victim before plea agreement.
 - Right to full restitution (not new).
 - Right to proceedings free from unreasonable delay (aside from participatory right, not new, b/c of Speedy Trial Act, which vindicates public interest).
 - Right to be treated with fairness, dignity and respect.
- From judiciary's perspective, most significant: Court is the enforcer! Para. 2b.
 - Large statutory responsibility—must make sure victim not excluded, heard from, etc. Judge should ask prosecutor whether consult w/ victim b/f guilty plea. (Prof doesn't always do this—but maybe should.)
- Reach of this legislation is potentially huge:
 - Could reach even uncharged conduct. Don't know how far it reaches. Relevant conduct? More?
 - Mandamus procedure – statute confers standing to bring petition for mandamus – extraordinary.
 - Get appellate review w/in 72 hours.
 - Procedural rights afforded crime victims extraordinary.
- Not a lot of case law development on this legislation.
 - Right to speak has been pretty much resolved (Kenna).
 - Mandamus relief is extraordinarily difficult to get – essentially off-the-reservation requirement – must show district court was WAY wrong – circuit split re standard of review: abuse of discretion; or off the reservation, like usual mandamus review.

In re Dean (5th Cir. 2008)

- Explosion at BP plant killed 15, injured over 170.
- Negotiated and announced plea agreement w/o informing victims. All victims granted oppy to speak at guilty plea hearing.
- Vs sued for mandamus to reject the plea agreement.
- Holding: Trial court should have fashioned reasonable way to inform Vs of likelihood of criminal charges and to ascertain the Vs' views on possible details of plea bargain. Ps should have conferred w/ V before deal struck. BUT mandamus standard is not satisfied.
- Vs wanted ordinary appeal standards to apply to mandamus. Court holds the traditional strict standards for obtaining writ of mandamus should apply.

Kenna v. U.S. (9th Cir. 2006)

- Holding: CVRA's right to be "reasonably heard" includes right to speak at sentencing, if present (even if had previously spoken at co-D's sentencing 3 months ago, and even if had submitted written materials).
- Writ of mandamus granted. District court erred in refusing to allow Vs to speak at sentencing hearing. Remedy: Allow Vs to file motion w/in 14 days to conduct new sentencing hearing, according Vs right to speak.
- Applies abuse of discretion standard to mandamus, instead of stricter test.

- XI. Judge's Perspective
 - a. Nelson § 5K1.1 Motion
 - b. Nelson PSR
 - c. Raymond PSR

- XII. Decision to Seek Death Penalty
 - a. Callins v. Collins (Scalia and Blackmun opinions)
 - b. King, "Cruel and Unusual History" (2008)
 - c. Data