NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

INCORPORATING THE PROCEDURAL JUSTICE MODEL INTO FEDERAL SENTENCING JURISPRUDENCE IN THE AFTERMATH OF *UNITED STATES V. BOOKER*: ESTABLISHING UNITED STATES SENTENCING COURTS

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> *"Research consistently finds that people's primary basis for accepting or rejecting the decisions made by police officers and judges is their evaluation of the* fairness of the procedures *used by the authorities to make those decisions."*[1]

INTRODUCTION

In *United States v. Booker*, the United States Supreme Court held that the Federal Sentencing Guidelines ("Guidelines") suffered from a fatal constitutional infirmity and therefore declared the Guidelines "effectively advisory."[2] In light of *Booker*, this article proposes a solution to the current problems faced in federal sentencing jurisprudence by proposing a process-oriented model to sentence criminal defendants. This theory is predicated upon empirical data developed by social psychologists in the area of procedural justice.

As set forth *infra*, the relevant data supports the proposition that positive valuations of sentencing outcomes will depend upon, and be influenced by, perceptions regarding the fairness of the

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[1] Tom Tyler, *Obeying the Law in America: Procedural Justice and the Sense of Fairness*, ISSUES OF DEMOCRACY, July 2001, at 16, 19 (2001), http://usinfo.state.gov/journals/itdhr/0701/ijde/tyler.htm (emphasis added).
[2] 543 U.S. 220, 245 (2005).

sentencing process.[3] Specifically, research suggests that satisfaction with outcomes is predicated upon, and closely related to, *perceptions* of procedural fairness. As a result, factors such as "voice" (the ability of individuals directly affected by a specific decision to have their opinions heard, considered, and respected by the decision-maker) and quality of treatment directly impact fairness valuations. Based on these findings, empirical data underscores that individuals are more likely to accept unfavorable outcomes if they believe that the attendant processes were fair and/or equitable.[4] The implication of this research is that process matters. Namely, acceptance of, and satisfaction with, decision-making and/or rule promulgation—particularly if unfavorable—depends heavily upon subjective perceptions of procedural fairness. Moreover, perceptions regarding institutional legitimacy, competency, and trust are closely connected to the manner in which individuals are treated and decisions are effectuated. Accordingly, based on research in the area of procedural justice, this article proposes a process-based model for federal sentencing practice that vests with select participants—the courts and criminal defendants—primary control over the ultimate sentencing determination and argues that sentencing decisions must be the product of procedures that are likely to be viewed as fair, equitable, reliable, and legitimate.[5]

Part I of this article provides an overview of research in the field of procedural justice, with particular emphasis on those factors that most heavily influence perceptions of fairness. Part II briefly discusses the adoption and implementation of the Guidelines and concludes that the Guidelines' outcome-determinative

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[3] *See* discussion *infra* Part I; *see also* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 118 (1975); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 551 (1978).

[4] *See generally* Tom Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988); Tyler, *supra* note 1.

[5] There exists a considerable body of literature in the criminal law context in which scholars advocate the development of a "common law" of sentencing whereby judicially created principles develop a jurisprudence to guide future cases. *See*, *e.g.*, Douglas A. Berman, *A Common Law for This Age of Federal Sentencing*, 11 STAN. L. & POL'Y REV. 93, 94 (1999).

model resulted in decisions that were the product of unfair processes and were themselves inherently unjust. Part III proposes that the United States Sentencing Commission, in conjunction with Congress, as well as state legislatures throughout the country, should consider creating independent "sentencing courts" whose sole function is to conduct separate sentencing hearings for defendants already convicted at trial.

I. PROCEDURAL JUSTICE MODELS AND APPLICATION TO THE LEGAL SYSTEM

A. BACKGROUND

Early social science research advanced the theory of distributive justice that "people were more likely to perceive that an interaction with the legal system was fair if they perceived that the decision or the outcome was fair."[6] This theory asserted that "people base their perceptions of justice on social comparison information as they compare how their outcomes fall relative to the outcomes of others, and whether the outcomes they receive are equitable in terms of the relative contributions and rewards of all the participants in the interaction."[7] Some distributive justice theorists suggested that "people compare the apportionment of outcomes based on need or 'deservingness' criteria."[8] In essence, "distributive justice theorists view people as primarily self-interested and as seeking to maximize their rewards (or resources) from their interactions with others. They therefore believe that people tend to focus on their outcomes

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[6] Jill Howieson, *Perceptions of Procedural Justice and Legitimacy in Local Court Mediation*, MURDOCH U. ELECTRONIC J. L., June 2002, at para. 25, http://www.murdoch.edu.au/elaw/issues/v9n2/howieson92_text.html.

[7] *Id.* (citing J. Adams, *Inequity in Social Exchange*, *in* 2 ADVANCES IN EXPERIMENTAL & SOC. PSYCHOL. (L. Berkowitz ed., 1965)).

[8] *Id.* at para. 26 (citing M.J. Lerner, *The Justice Motive in Human Relations: Some Thoughts on What We Know and Need to Know About Justice*, *in* THE JUSTICE MOTIVE IN SOCIAL BEHAVIOUR (M.J. Lerner & C. Lerner eds., 1981); M. Deutsch, *Justice in "The Crunch," in* THE JUSTICE MOTIVE IN SOCIAL BEHAVIOUR, *supra*).

from a legal dispute resolution procedure as the source of their fairness and satisfaction ratings."[9]

Research soon showed that, irrespective of the actual outcome, procedural fairness directly and positively impacted disputants' satisfaction with and acceptance of a resolution.[10] Importantly, this observation was consistent regardless of the parties' interest in the outcome of the dispute, at both individual and institutional levels.[11] Perhaps more importantly, research revealed that individuals were far more likely to accept negative outcomes if they believed that the procedures in effectuating such outcomes were fundamentally fair.[12] As such, it became apparent that *process* mattered and that "procedural justice strongly influences institutional legitimacy and, through it, the acceptance of institutional decisions."[13]

Critically, however, procedural justice theorists do not "exclude distributive justice as an important concern in people's perceptions of the justice and legitimacy of the legal system."[14] Instead, distributive justice "simply seeks to highlight the importance of the often-neglected procedural aspects of decision making, as opposed to [merely] the end result."[15] Thus,

> [t]he perception of the fairness of the outcomes still has an impact on people's impressions of their experience with legal authorities, . . . [but w]hen the outcome information does arrive, it is usually interpreted in terms of already-existing

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[9] *Id.*
[10] *See id.* at para. 27 (citation omitted).
[11] *Id.* (citing E. Allan Lind, et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224 (1993)).
[12] *Id.* at para. 28 (citing Mark Fondacaro, *Toward a Synthesis of Law and Social Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 DENV. U. L. REV. 303, 305 (1995)).
[13] *Id.* (quoting Fondacaro, *supra* note 12, at 305).
[14] *Id.* at para. 30.
[15] *Id.*

> beliefs about the [decision-making] authority, namely[,] existing impressions of its procedural justice.[16]

The concept of procedural justice is expressed in various forms and applicable to numerous contexts. For purposes of clarity, the aspect of procedural justice most relevant to this article is that which is concerned with administration of justice and legal proceedings in a *procedurally fair and transparent manner*.[17]

B. THE DIFFERENT ASPECTS OF PROCEDURAL JUSTICE

Procedural justice encompasses three distinct concepts, as developed by John Rawls in *A Theory of Justice*: (1) perfect procedural justice; (2) imperfect procedural justice; and (3) pure procedural justice.[18] The concept of perfect procedural justice is characterized by the following two elements: first, an independent criterion of what is a fair allotment—a criterion defined separately from and prior to the procedure which is to be followed; and, second, a procedure that is sure to give that desired outcome.[19] In essence, perfect procedural justice strives to ensure that certain outcomes are reliably and consistently produced.[20] Alternatively, imperfect procedural justice, while establishing procedures for outcome fairness, does not guarantee that a particular result will be achieved.[21] Lastly, pure procedural justice includes no independent criterion for the right result. Instead, it requires a correct or fair procedure resulting in a belief that the outcome—whatever it is—is likewise correct or

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[16] *Id.* (citing Kees Van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J. PERSONALITY & SOC. PSYCHOL. 1493, 1498 (1998)).

[17] *See generally* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 946–53 (2006).

[18] *See* JOHN RAWLS, A THEORY OF JUSTICE 73–75 (rev. ed. 1999).

[19] *See* Carole Necole Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 BUFF. L. REV. 65, 104 (2005).

[20] *See id.*

[21] *See* Wojciech Sadurski, *Law's Legitimacy and 'Democracy-Plus,'* 26 OXFORD J. LEGAL STUD. 377, 397–99 (2006).

fair, provided that the procedure has been properly followed.[22] Ultimately, as stated by Jerry Mashaw in *Due Process in the Administrative State,* "[w]e all feel that process matters to us irrespective of result. . . . [T]here seems to be something to the intuition that process itself matters."[23]

Thus, to the extent that individuals place significant value on the fairness of procedures when considering the legitimacy of outcomes, it is critical to ascertain the factors that constitute a "fair" process. Researchers have identified several factors that, as a general matter, contribute to perceptions that a process/procedure is fair, and are concomitantly likely to engender favorable valuations. First, the notion of consistency—similar treatment of similar cases—is an integral component of a just process.[24] Second, of equal importance is the concept of neutrality—that "those carrying out the procedures must be impartial and neutral. . . . Those involved should believe that the intentions of third-party authorities are benevolent, that they want to treat people fairly and take the viewpoint and needs of interested parties into account."[25] Third, individuals who are likely to be affected by a particular decision "should have a voice and representation in the process . . . [because] representation affirms the status of group members and inspires trust in the decision-making system."[26] Finally, disputes should be resolved in a manner bespeaking transparency and openness.[27]

In terms of legal systems, Professor Tom Tyler identifies four factors of particular relevance to procedural fairness in the legal system:

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[22] *See id.* at 397.

[23] JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 162–63 (1985).

[24] *See* Robert Folger, Blair H. Sheppard & Robert T. Buttram, *Equity, Equality and Need: Three Faces of Social Justice*, *in* CONFLICT, COOPERATION, AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH 261, 272 (Barbara Benedict Bunker & Jeffrey Z. Rubin eds., 1995).

[25] Michelle Maiese, Procedural Justice (Jan. 2004), http://beyondintractability.org/essay/procedural_justice.

[26] *Id.*

[27] *See id.*

> First, [individuals] value the opportunity to participate and give input when decisions are being made [the "voice" factor]. Second, they want procedures to be . . . unbiased, based upon factual criteria and made via the consistent application of rules. Third, they want to be treated with dignity and respect, and to have their rights acknowledged. Fourth, they want to feel that the authorities have considered their needs and concerns, and have been honest in their communications with them.[28]

Professor Tyler notes that "each of these concerns is typically more important in decisions than are assessments of the fairness or favorability of the decision itself."[29] Inherent in Professor Tyler's factors are voice ("providing an environment where a person can present their case to an attentive tribunal"[30]), validation ("acknowledgement by the tribunal that the case has been heard and taken into account"[31]), and respect ("whether the judicial officer takes time to listen to the party, the tone of voice and language used and the body language of the judicial officer in interacting with the participant"[32]). Importantly, further research has revealed that, in addition to these factors, individuals include the following two factors in making fairness valuations: (1) accuracy, the ability of authorities to render competent decisions; and (2) correctability, the existence of other, higher-level authorities to whom one can appeal.[33]

Professors Tyler and Steven Blader have incorporated these factors into a two-dimensional model of procedural justice that offers a comprehensive account of the components that inform fairness

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[28] Tyler, *supra* note 1, at 20.
[29] *Id.*
[30] Michael S. King, *The Therapeutic Dimension of Judging: The Example of Sentencing*, 16 J. JUD. ADMIN. 92, 95 (2006).
[31] *Id.*
[32] *Id.*
[33] Raymond Paternoster, Robert Brame, Ronet Bachman & Lawrence W. Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 167–68 (1997).

valuations.[34] The first dimension concentrates on "the different functions or roles served by procedures."[35] This "procedural function" aspect involves two distinct components. The first component reflects the processes, identified above, that people consider relevant when rendering fairness valuations. The second component extends beyond the objective factor comprising the decision-making process and examines "the social atmosphere of the group or situation"[36] and the "quality of the treatment people experience as a group member or as a party to an interaction, dispute, and so forth."[37] "Procedural function" analysis is based upon structural or formal influences in the decision-making process.

The second dimension in Tyler and Blader's analysis is "procedural source." "[P]articular group authorities, who typically implement procedures, create rules when there are no formal prescriptions to guide them, and . . . have idiosyncratic interpersonal treatment styles."[38] The procedural source dimension reflects the reality that "particular authorities are . . . likely to play a pivotal role in the overall perception of fairness."[39] Such recognition, therefore, involves an evaluation of individual or informal influences on fairness valuations. In other words, the individuals or authorities responsible for implementing fair processes are themselves subject to valuations that ultimately influence perceptions of fairness.

Consequently, according to Tyler and Blader's model, individuals take into account: (1) formal decision-making, or the formal rules and policies that govern decision-making processes; (2) formal quality of treatment, defined as the formal policies that influence the treatment of individuals; (3) informal decision-making, namely, the method by which authorities make decisions; and (4) *informal*

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[34] *See* Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747 (2003).
[35] *Id.* at 748.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 749.
[39] *Id.*

quality of treatment, specifically, how individual participants are treated by individual authorities.[40]

C. APPLICATION TO THE LEGAL DECISION-MAKING CONTEXT

In a study concerning the degree of public trust and confidence in America's state courts, the results followed Tyler and Blader's model:

> Importantly, it is the fairness of court processes, *not the fairness of court outcomes or decisions*, that are most important. Literature in the procedural justice field indicates that both litigants and the general public . . . distinguish between the fairness of the process, and the fairness, or even favorability, of the outcomes. In evaluating judicial performance, and in determining the level of trust in judicial authority, the fairness of the dispute resolution process is more important than even a favorable outcome. In the minds of litigants, the importance of a favorable outcome is consistently outweighed by the impact of an unfair process.[41]

Interestingly, researchers also concluded that, "[n]ot only do litigants and the public feel that fair processes are more important than favorable outcomes, but they also feel that courts do a somewhat better job in using fair procedures than in arriving at fair outcomes."[42]

These findings are critical because "most judges tend to focus on outcomes, not process, *i.e.*, on the legal correctness of their rulings and decisions rather than on the fairness of their decision-making processes."[43] However, as procedural justice, and this study

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[40] *Id.*
[41] Roger K. Warren, *Public Trust and Procedural Justice*, CT. REV., Fall 2000, at 12–13, *available at* http://aja.ncsc.dni.us/courtrv/cr37/cr37-3/CR37-3Warren.pdf (internal citation omitted) (emphasis added).
[42] *Id.* at 14.
[43] *Id.*

in particular, indicates, "it is often the fairness of these decision-making processes, rather than the judicial decisions themselves, that are important to litigants and the general public, and it is this sense of fairness that forms the basis of judicial performance evaluation and determines the level of trust in judicial authority."[44] Accordingly, a participant in this study also reflected that, "[a]s judges, we should pay more attention to the fairness of our decision-making processes."[45]

Professor Tyler also offers an important insight into the application of procedural justice research to legal decision-making:

> [P]eople's ethnicity, gender and social status do not influence their views about what makes a procedure fair. This suggests that procedural fairness may be an especially valuable mechanism through which to find solutions to disputes that cross group boundaries. . . . Since the ability of a fair procedure to facilitate acceptance of decisions has been noted, it is encouraging that people seem to agree widely about what makes a procedure fair. Similar procedural justice findings emerge when we examine people's everyday obedience to the law. *People are more likely to obey the law when they have trust and confidence in the fairness of the procedures used by legal authorities and legal institutions. . . . [L]egal authorities build a legal culture within which people feel a personal responsibility to abide by the law. . . . The key to creating and sustaining such a society is the use of fair procedures by legal authorities*.[46]

The utilization of "[f]air" procedures "tend[s] to inspire feelings of loyalty . . . , legitimize the authority of leaders, and help to ensure voluntary compliance with the rules."[47]

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[44] *Id.*
[45] *Id.*
[46] Tyler, *supra* note 1, at 20–21 (emphasis added).
[47] Maiese, *supra* note 25.

Ultimately, perceptions of procedural fairness reflect a "relational" rather than "instrumental" concept of justice,[48] which focuses upon the interpersonal nature of dispute resolution in the receipt of desired outcomes.[49] Thus, "people do not focus on procedures for the instrumental role they play in the receipt of desired outcomes, but instead for the message they convey about one's relationship with their group."[50] Relational procedural justice is not concerned primarily with outcome, decision, or process control, but is concerned with "status . . . in [a] group."[51] When an authority figure treats disputants with respect, their social status is dignified. Legal procedures can therefore foster esteem and thereby promote the perception of fairness by allowing participants the opportunity to express themselves and be heard by legal authorities.[52] Such views, which derive from non-instrumental theorists, recognize that the process control effects of "voice," "validation," and "respect" directly, substantially, and positively impact upon fairness perceptions, contributing to significant feelings of self-regard and group cohesiveness.[53] "If people feel that they are treated fairly . . . this reassures them that they are respected and valued by the authority and the group . . . ."[54] Such assurance renders people more likely to accept the outcomes of procedures, regardless of their favorability.[55]

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[48] *See, e.g.*, Howieson, *supra* note 6, at para. 33 (discussing the "instrumentalist" approach as advocated by Thibaut and Walker, and stating that "[i]nstrumental control theorists view direct or indirect control over outcomes as a central characteristic of procedural justice as they assume people are primarily concerned with the end-result or outcome of a dispute resolution process. In this sense, instrumental control theories are similar to distributive justice theories in that they both focus on outcomes.").

[49] *See* David De Cremer & Steven L. Blader, *Why Do People Care About Procedural Fairness? The Importance of Belongingness in Responding and Attending to Procedures*, 36 EUR. J. SOC. PSYCHOL. 211 (2006).

[50] *Id.* at 212.

[51] *Id.*

[52] *See id.*

[53] *See id.*

[54] *Id.*

[55] *See* Linda Musante, Marcia A. Gilbert & John Thibaut, *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 223,

II. APPLICATION OF PROCEDURAL JUSTICE PRINCIPLES TO THE FEDERAL SENTENCING GUIDELINES

Application of the foregoing analysis reveals that the Guidelines are not likely to engender positive fairness valuations. Given the importance of procedural justice in shaping individuals' perceptions of the legal system, efforts should be undertaken to reform the current federal sentencing paradigm. In the wake of *Booker*,[56] the courts' increased discretionary authority provides a meaningful opportunity to effectuate principled reforms that both respond to procedural fairness concerns and increase the prospect that criminal sentencing decisions will engender positive perceptions concerning fairness and legitimacy.

The Guidelines were created in response to what was widely perceived to be an inequitable, unjust, and unprincipled sentencing system.[57] The pre-Guidelines era lacked a coherent, policy-based sentencing philosophy.[58] Judges enjoyed nearly unconstrained authority over sentencing decisions, resulting in sentences that were disparate and widely perceived as unfair. Furthermore, evidence arose indicating that factors such as race and gender influenced the sentencing determination.[59] Courts were not required to explain the reasons underlying the imposition of a particular sentence and often decreed sentences without any accompanying justification.[60] Even more troubling was the fact that appellate review of trial court

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233–38 (1983); *see also* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 26 (1988); Howieson, *supra* note 6, at para. 33.

[56] United States v. Booker, 543 U.S. 220 (2005).

[57] *See, e.g.*, Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 46 (1972) ("[S]entencing criteria . . . exist and operate . . . in an arbitrary, random, inconsistent, and unspoken fashion.").

[58] *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 26–28 (2000) (discussing a sentencing system that lacked any principled justification).

[59] *See, e.g.*, *id.* at 26.

[60] *See, e.g.*, Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1445–46 (1997).

sentences was unduly deferential.[61] In essence, in the pre-Guidelines era, there existed no process *or* outcome controls.

The Sentencing Reform Act of 1984, which created the Commission and empowered it to promulgate Sentencing Guidelines, was designed to remedy these infirmities.[62] However, the Guidelines failed in two important respects to effectuate meaningful changes to federal sentencing. First, in both their promulgation and application, the Guidelines failed to specify the policies or purposes underlying sentencing, such as adoption of retributive or deterrence-based sanctions. Second, the Guidelines overly limited the independent exercise of judicial discretion, by allowing departures in only unusual or atypical cases.[63]

With respect to the first failure, to the extent that pre-Guidelines sentences failed to set forth any reasons justifying their imposition, the average Guidelines sentence suffered from the same problem. Professor Paul Robinson effectively argues that the Guidelines failed to articulate any specific purposes to justify consistent application of their sentencing norms:

> The Sentencing Reform Act took judges out of the sentencing philosophy business so that a single, centralized authority—the Commission—could sort through the competing arguments and come to a single conclusion on sentencing philosophy for a given case. But, the Commission never undertook this analysis. Instead, it based its sentences on mathematical averages of past practice[s] of federal sentencing judges, with minor and equally irrational adjustments.
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> The effect of this foundation of the Guidelines is that no one, Commissioner or judge, can give an explanation for any Guideline sentence other than to say that the sentence is what has been done in the past, or, worse, that the sentence is

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[61] *See id.* at 1445.
[62] *See* Ramon E. Javier, *The Federal Sentencing Guidelines*: *A Need to Restore "The Balance,"* 9 J. SUFFOLK ACAD. L. 179, 182–83 (1994).
[63] *See* Berman, *supra* note 58, at 70.

> the mathematical average of what has been done in the past. . . . Judges may have disagreed, for example, whether it is best to give drug users who sell to support their habit a purely rehabilitative, nonprison sentence to a drug treatment program, or whether it is better to give a long prison term to provide a dramatic deterrent. Both approaches have a logic and can be rationally defended. The same cannot be said for a mathematical average of the two, which may be too short for the dramatic deterrent and yet not provide the drug rehabilitation.[64]

The Guidelines' overriding objective was to ensure outcome certainty by eliminating disparity through the uniform treatment of similarly situated defendants. The focus on outcomes as opposed to means overlooked concerns about the process by which such results were reached and whether the results themselves were fair and just.

The second problem was that the Commission created a Guidelines structure that was a set of pre-determined sentencing ranges for specific offenses, which consisted largely of the *mathematical average* of previous unprincipled sentences.[65] In other words, despite the fact that pre-Guidelines sentences were often imposed without any explicit purpose or underlying justification, such sentences became an integral, if not indispensable, aspect of the Guidelines' paradigm. Importantly, the Commission acknowledged this fact when issuing its initial draft of the Guidelines:

> In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. . . . [The Commission] has not attempted to develop an entirely new system of sentencing. . . . Guideline sentences, in many instances, will approximate

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[64] Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later: An Introduction and Comments*, 91 NW. U. L. REV. 1231, 1241–42 (1997).
[65] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A4(g) (2008).

> average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity.[66]

The Guidelines provided that courts could only depart from the Guidelines if there was "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines that should result in a sentence different from that described."[67]

The problem with this approach is that there are very few, if any, instances where one can legitimately argue that the Commission did not "adequately consider" a particular sentencing factor. Even a cursory glance at the Guidelines reveals the erroneous nature of such a proposition. The current Guidelines manual itself is hundreds of pages long, contains multiple sections and subsections, and lists in great detail the circumstances—pertaining both to the offender and offense—that are relevant to the sentencing decision.[68] The Guidelines even set forth specific factors that courts were directed not to consider when sentencing a particular defendant.[69] Furthermore, the Guidelines are quite comprehensive and include an exhaustive list of factors for judges to consider when sentencing a particular defendant for a specific crime. Thus, in an apparent desire to achieve outcome certainty or predictability, irrespective of process fairness, the Commission seemingly intended that departures under the Guidelines would be "rare occurrences" because, in its own words, "courts will rarely in fact need to exercise their legal freedom to depart from the guidelines."[70] It is not an overstatement to assert that courts were reduced to mechanistic application of the Guidelines' ranges, and

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[66] *Id.*
[67] 18 U.S.C. § 3553(b) (2000).
[68] *See generally* U.S. SENTENCING GUIDELINES MANUAL (2008).
[69] *See* U.S. SENTENCING GUIDELINES MANUAL § 1A4(b) (2008).
[70] Terence F. MacCarthy & Nancy B. Murnighan, *The Seventh Circuit and Departures from the Sentencing Guidelines: Sentencing by Numbers*, 67 CHI.-KENT L. REV. 51, 56 (1991).

defendants were relegated to receiving sentences that were predetermined before they even arrived at the sentencing hearing.

Yet it is precisely the Guidelines' outcome-oriented approach which procedural justice research suggests cannot engender positive valuations concerning the fairness of its process. The Guidelines are flawed because the procedures adopted to ensure their consistent application are fundamentally unfair and unlikely to promote confidence, trust, and legitimacy in criminal sentencing. First, the Guidelines deprive both the court and the defendant of a "voice" in the decision-making process. As stated above,[71] prior to *Booker*, and to some extent in *Booker*'s aftermath, the court was advised to impose a mathematically averaged, pre-determined sentence, which arguably has little relation to the many nuances that an individual case ineluctably presents. The court's authority to exercise independent judgment, engage in independent analysis, or foster creative, alternative sentences that both speak to the needs of the defendant and reflect the court's own judgment is strictly circumscribed. As a result, the sentencing court is relegated to a far more administrative role: responsible for applying the Guidelines, yet discouraged from arriving at independent sentencing determinations informed by that court's experience, knowledge, and beliefs concerning fairness in a particular case. Based upon both the Guidelines' structure and procedural justice research, it cannot be said that courts—at either the trial or appellate level—retain significant voice, control, or influence with respect to the sentencing process or outcome. Moreover, while *Booker* arguably increased the courts' discretionary authority, many circuit courts have interpreted such discretion quite narrowly and indicated that the Guidelines should still be applied unless atypical circumstances warrant a departure.[72]

With no voice, the criminal defendant is likely to feel neither respected as a participant in the process nor acknowledged by the institution directly responsible for depriving him of liberty. In what

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[71] *See supra* text accompanying notes 65–66.

[72] *See, e.g.*, Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence After* Booker, 18 FED. SENT'G REP. 174–81 (2006).

appears to be an improvident approach to sentencing, the defendant stands before a court and, based simply upon the charged offense, the resulting sentence can be ascertained with a reasonable degree of certainty. The defendant's voice is severely restricted because the outcome (the applicable sentencing range) is in most cases already determined before the defendant utters a word to the court. While the defendant always has the opportunity to provide information to the court for the purpose of influencing the sentencing decision, the value of such information is degraded because it can only be used to request a departure from a predetermined and routinely imposed sentencing range. In other words, by focusing upon outcome certainty, the Guidelines create an unfair sentencing process that depends more upon a rigid structure than upon the useful exchange of information to support a particular result.

The consequence is that our sentencing structure risks engendering negative perceptions regarding its institutional legitimacy, competency, and ability to effectuate fair outcomes. There is little possibility that the defendant, or the public, will perceive the criminal sentencing process as trustworthy, which will in turn cause a lack of confidence in the courts' institutional capabilities, concerning both fair processes and just outcomes.

This article proposes that, based on procedural justice research, the outcome-based structure of the Guidelines is directly responsible for the unfair processes—in particular, limited departure authority—that accompany its administration. In addition, despite being outcome-determinative, the Guidelines do not in fact achieve outcomes that are congruous with notions of fairness. Neither the process of sentencing nor the outcomes it obtains are fair. The proposal set forth below includes several reforms concerning the method by which a sentencing decision is reached.

III. REFORMING FEDERAL SENTENCING LAW BASED ON PROCEDURAL JUSTICE RESEARCH: ESTABLISHING UNITED STATES SENTENCING COURTS

When *Booker* rendered the Guidelines "effectively advisory,"[73] the courts were provided not only with increased discretionary authority, but also with the power to fashion a sentencing procedure that reflects fair processes. In the wake of *Booker*, several issues have arisen that directly implicate the degree to which post-*Booker* sentences will comport with notions of procedural fairness. For example, the weight that the now-advisory Guidelines should have in the sentencing determination is a matter of disagreement among courts and academics.[74] Ostensibly believing that the Guidelines should have substantial and continuing influence, several courts have held that a sentence imposed in accordance with the advisory Guidelines norms is presumptively reasonable.[75] Furthermore, many appellate courts require that, to avoid automatic reversal, the district court correctly calculate the advisory-Guideline range.[76] Others have required that extraordinary deviations from the Guidelines be supported by extraordinary justifications.[77]

The courts after *Booker* appear reticent to effectuate meaningful change to federal sentencing jurisprudence. Because the current federal sentencing model is still based in large measure upon the Guidelines and is not the product of fair processes, this article proposes the following suggestions for an alternative sentencing model to improve federal sentencing law.

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[73] United States v. Booker, 543 U.S. 220, 245 (2005).
[74] *See* Lamparello, *supra* note 72, at 176–78.
[75] *See, e.g.*, United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Johnson, No. 04-1518, 2006 WL 45855, at *1 (7th Cir. Jan. 10, 2006).
[76] *See, e.g.*, United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005).
[77] *See, e.g.*, United States v. Castro-Juarez, 425 F.3d 430, 433 (7th Cir. 2005); *see also* Gall v. United States, 128 S. Ct. 586 (2007); Kimbrough v. United States, 128 S. Ct. 558 (2007).

A. THE GUIDELINES SHOULD NOT BE PRESUMPTIVE OR OTHERWISE RETAIN SUBSTANTIAL INFLUENCE IN THE SENTENCING DECISION.

Although some courts have decided otherwise,[78] the Guidelines should not retain significant weight in the sentencing process because the sentencing ranges neither further an identifiable purpose of criminal punishment nor reflect the adoption of a coherent penal philosophy. Moreover, the sentences upon which the mathematical averaging was based were, in themselves, largely unprincipled and without sufficient justification by the trial court.

Furthermore, undue reliance on the Guidelines' sentencing norms would frustrate the goal of providing increased "voice" to the defendant and to the court in the sentencing process. Retaining the presumptive status of the Guidelines reduces courts' discretionary authority and defendants' ability to present information relevant to sentencing. Under the current status of the Guidelines, a defendant has to overcome a difficult presumption hurdle instead of being able to use his voice for a comprehensive, fact-based sentencing hearing. Instead, the Guidelines should be utilized, if at all, as a source of information regarding past sentencing practices and not as a dispositive or predominant factor in the sentencing determination.

1. Composition of Sentencing Courts

This article proposes that the United States Sentencing Commission be eliminated because the Guidelines developed by the Commission do not create fair sentencing processes or result in fair outcomes.

Even more fundamentally, however, sentencing reform and the development of fair processes originate with the courts, who not only have experience in criminal sentencing, but who are also most closely situated to criminal defendants and the facts upon which a sentence will be imposed. Furthermore, investing the courts with discretionary authority that is free from the Guidelines' influence

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[78] *E.g.*, *Castro-Juarez*, 425 F.3d at 433; *Mashek*, 406 F.3d at 1017.

will facilitate the development of a principled body of decisional law that discusses not only the facts that should remain relevant in sentencing but also the purposes that can be furthered through adoption of specific sentences for particular crimes. In other words, judges should be allowed to judge. With freedom from mechanically applying the Guidelines, the courts will be able to exercise their voices and exercise discretion in a purposeful and meaningful way. Individuals will be accorded validation and respect in a Guidelines-free hearing.

Critically, the sentencing endeavor should no longer remain within the province of district court judges who preside over so many cases that individual deliberation for every sentencing determination is not likely to be practicable. Therefore, this article proposes the creation of the United States Sentencing Courts, which would address the reality that sentencing implicates a variety of legal, constitutional, and policy issues that warrant special, individualized attention.

Congress should enact corrective legislation and create the United States Sentencing Courts, giving them primary jurisdiction over the sentencing of convicted defendants. The sentencing courts should be comprised of appointed federal judges with demonstrable expertise in criminal sentencing. They should devote exclusive attention to issues that are unique to sentencing, such as the types of sentences that are desirable for particular offenses and the policies that are best served by the sanctions adopted for specific crimes. For example, some courts may advocate rehabilitative penalties for individuals convicted of drug-related offenses, while others may support deterrence-based sanctions. The existence and evolution of this debate will contribute to the development of principled sentencing decisions that address issues relevant to criminal punishment. In turn, the courts can begin to develop a substantive body of sentencing jurisprudence that is based on a coherent penal philosophy.

Of course, ensuring that a defendant has adequate "voice" (and is treated fairly) depends as much, if not more, on the procedures adopted by the sentencing courts than on the mere establishment of

the court itself. Thus, the United States Sentencing Courts should conduct sentencing hearings in accordance with a fundamentally fair process. The first aspect of that process, consistent with voice concerns, is to place no limits whatsoever upon the information that a defendant may present at sentencing. Indeed, the lack of constraints on the information exchange will allow the defendant to advance any arguments that may or may not bear relevance to the sentencing determination, thus giving the defendant a meaningful opportunity to influence the ultimate outcome. The defendant's increased voice will also provide the courts with substantial information upon which to base a sentencing decision. Accordingly, the requirements of procedural justice may be met.

2. Written Opinions

To promote positive valuations regarding quality of treatment, the sentencing courts should issue substantive written sentencing opinions that state with specificity the criteria, both factual and legal, upon which the sentence is predicated. In the sentencing opinion, the court should identify the facts that it received from the defendant and considered when arriving at the sentencing decision. The court should also explain why particular facts were considered more relevant than others, whether certain facts were influenced by negative perceptions regarding credibility, and the precise rubric by which the court's analysis was conducted. The sentencing opinion should be read in open court, with the defendant present, and conducted in a manner and tone that indicate that the defendant's voice was carefully considered. In this way, the sentencing outcome will result from a process through which the defendant can perceive that he exercised adequate voice and influence, while receiving respect from the decision-maker. As suggested by procedural justice research, these factors will not only increase the likelihood of positive fairness valuations, but will also render the defendant more accepting of the outcome, regardless of favorability. Ultimately, these variables can have a positive impact upon defendants' perceptions that courts' decisions, and the sentencing institution itself, are competent, legitimate, trustworthy, and reliable.

3. Meaningful Appellate Review

Finally, the Circuit Courts of Appeal should retain their jurisdiction to conduct meaningful appellate review of the United States Sentencing Courts. While the appellate review process should recognize that the sentencing court possesses unique expertise in the area of criminal sentencing, it should not be unduly deferential. Rather, the appellate courts should review carefully the specific reasons upon which the lower court relied when determining the appropriate sentence and discern the specific purposes of sentencing (retribution, deterrence, incapacitation, or rehabilitation) that are purportedly furthered in a specific case. If the court's decision is without adequate basis in fact or law, or relies on factors not appropriate to the sentencing (like race or socioeconomic status), the appellate court should reverse and order a new hearing before a new sentencing judge. The purpose of substantive appellate review is to provide guidance to courts that will likely consider future cases involving similar offenses and to affirm the defendant's voice through careful deliberation regarding the sentencing outcome. The combination of principled sentencing decisions and meaningful appellate review should lead to a comprehensive body of law that sets forth the purposes and policies that underlie federal sentencing law. Perhaps more importantly, the sentencing courts will be precisely the type of deliberative body that, through principled, purpose-driven, and fact-intensive determinations, can positively influence perceptions of fairness while creating a doctrine-based sentencing jurisprudence.

B. CRITICISMS

Assuming that procedural reforms can enhance positive valuations of the sentencing process, critics of this model may question why we should be concerned about obtaining such evaluations, particularly among criminal defendants. Indeed, sentencing law reflects legislative and judicial policy predilections that are designed to prevent crime and deter criminal conduct. It is not intended to seek justification or approval from those guilty

of criminal offenses; if anything, the input of an offender should be of peripheral importance, and the process by which punishment is imposed should not be the product of open dialogue. Penalties should be enforced consistently, and similar offenders should receive substantially similar sentences. Thus, to the extent that judicial discretion is permitted, it should be reserved for the most extraordinary cases. Otherwise, the salutary value of uniformity will be undermined, and sentencing will return to a state of uncertainty where disparities result from the subjective sentencing preferences of individual judges. The Guidelines were designed to avoid precisely these disparities.

These criticisms are not without merit and, to a certain extent, reflect a judgment about punishment that values deterrence through the consistent application of harsh sentences. But this argument assumes that the offense can readily be separated from the individual offender—a position that fails to reflect the realities of criminal behavior. Crimes are not committed in isolation. They are often, but not always, the product of complex social, psychological, socio-economic, and behavioral dynamics that influence the choices offenders make and the intentions with which they act. To consider the offense in isolation from the offender is tantamount to a judgment that criminal offenses are generally not accompanied by mitigating evidence to such a degree that would justify individualized sentencing. Under critics' views, procedural concerns, particularly at the sentencing (rather than adjudicatory) phase, will likely be of secondary importance.

However, this criticism does not reflect the reality of human behavior, which is the result of factors to which the individual is subject (such as environmental or socio-economic) and from which an individual often suffers (such as psychological conditions). These factors not only render individual defendants largely dissimilar from one another, but also make the crimes for which defendants were convicted worthy, in some instances, of different punishments. In other words, the concept that defendants are "similarly situated" reflects, to some degree, a disregard for many of the contextual factors that should bear upon

the sentencing decision. To those who evince a policy predilection for uniformity in sentencing, the presence of increased discretion or fairer procedures would serve to compromise this goal.

Moreover, the Sentencing Courts' increased discretionary authority will not result in the intolerable disparities that characterized pre-Guidelines jurisprudence. In the pre-Guidelines era, courts had unfettered authority to sentence criminal defendants based on an unlimited array of factors, and evidence suggested that impermissible factors such as race and socioeconomic status often impacted the sentencing disposition.[79] Because there existed no meaningful appellate review, the exercise of courts discretionary authority was virtually unchecked.

However, the purpose of Sentencing Courts is to channel judicial discretion in a principled, purpose-driven, and policy-oriented manner. Indeed, while having no limits on the information that may be considered in the sentencing determination, the Sentencing Courts will be required to draft written opinions that state with particularity the specific purposes of criminal punishment that are being effectuated through adoption of a particular sentence. The court will be required to identify the specific facts upon which its sentencing decision is predicated and justify such sentence with reference to a retribution-, rehabilitation-, incapacitation-, or deterrence-based objective. Furthermore, meaningful appellate review will provide a measure of accountability to the Sentencing Courts and provide the appellate courts with the opportunity to further clarify or expand upon the substantive reasoning that undergirds a particular sentence. Thus, through the adoption of substantive sentencing decisions, courts can begin to create a principled and purpose-based body of sentencing law, and such law will be more likely to engender positive valuations because it will be based upon a credible, legitimate, and fair process.

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[79] *See* Adam Lamparello, *Introducing the "Heartland Departure,"* 27 HARV. J.L. & PUB. POL'Y 643, 650 (2004) (quoting Berman, *supra* note 58, at 26).

III. CONCLUSION

Criminal sentencing is a serious enterprise because it deprives people of their freedom and, in the most extreme cases, their lives. If for no other reason than to respect the significance of this endeavor, legislatures and courts should strive to achieve, through the sentencing decision, the "best" or most equitable result. That result depends upon producing proper *outcomes* that are *also* the product of *fundamentally fair* procedures. The creation and implementation of sentencing courts—at both the state and federal levels—can achieve these objectives. Sentencing courts will be a forum where the free flow of information concerning the factors relating to the charged offense, along with the defendant's character and background, will be germane to the sentencing determination. The defendant's voice will thus be an important aspect of the sentencing process.

Furthermore, sentencing courts will be required to draft doctrinally rich and purpose-driven sentencing decisions that explain with precision and detail why a particular punishment was adopted for a specific defendant and what purposes such sanction ostensibly furthers. Such opinions will mark the beginning, rather than the end, of a substantive sentencing dialogue among the courts, in which issues such as the types of punishments for specific crimes, the purposes of punishment for particular offenders, and the adequacy of sentencing alternatives will be addressed. From this discourse will evolve a substantive body of sentencing law that can provide a policy-based foundation upon which our sentencing jurisprudence can be based, a foundation which the Guidelines never achieved and which, now more than ever, is needed. The upshot to this system will be a sentencing paradigm that produces well-reasoned outcomes through fundamentally fair procedures, which—in time—will engender positive valuations from all those responsible for and affected by sentencing law and policy.