Matthew Jill

One Small Step: ***The Past, Present, and Future of the Federal Sentencing System***

The federal sentencing guidelines, which focus on offense based statistical consistency, had a ripple effect that molded the entire federal sentencing system in it's wake; this article is an individual case study demonstrating the flaws of a consistency based sentencing system, the injustice such a system can create, and why United States v. Booker is only the first step in creating a fair and effective sentencing system.

I. Introduction

Theoretical viewpoints as to the purpose and methods of punishment have been a thread in the fabric of the American justice system since its inception. Over the past several decades there has been a push, largely by conservative groups and lawmakers, for consistency and severity in sentencing. I argue that although statistical consistency is an element of fairness in theory, the multitude of differences in every human being, every circumstance, and every incidence of crime, makes true consistency in sentencing nearly impossible. Focusing predominantly on consistency as a sentencing theory is contrary to the most important factor of criminal sentencing, assuring that each individual convicted of a crime receives the sentence he or she actually deserves. Matching actual culpability to the sentence imposed will never be a perfect science, but given our societal practice of treating humans as individuals, the goal of sentencing should be to get as close a match as possible. With this paper I demonstrate the flaws in the consistency approach through a case study of a current Federal prisoner.

In order to reach the level of consistency lauded by conservatives as necessary, the techniques employed in a new Federal sentencing system would likely have to mirror those in the old system in several key ways. The purpose of this paper is to establish the flaws in such an approach. Part I is an overview of the background of the push for

consistency in sentencing and also introduces the case that will be individually studied. Part II addresses four aspects of the Federal Sentencing Guidelines that have often been criticized and that provide substantial evidence of the injustice that can result from a goal as restrictive as statistical consistency in sentencing. The areas of concern are the complexity necessary for consistency, the rigidity necessary to deter discretion, the procedural injustices of real offense sentencing, and the change in role of the parties involved in the sentencing process. Each section is preceded by narrative looks into how these aspects directly affected our individual case study. Part III addresses the fundamental issue of the meaning of consistency and why statistical consistency is an inappropriate measure for sentencing. Part IV focuses briefly on ideas for the future including parole, less complicated guidelines, alternative forms of punishment, and the elimination of mandatory minimum sentences.

I. Background – A Great Idea

When Congress passed the Sentencing Reform Act of 1984[1] the vision was of "an interactive guidelines process involving federal judges, the Department of Justice, the Probation System, the Bureau of Prisons, and the Federal Public Defenders."[2] These systems would work together using the wealth of statistical and anecdotal data available in order to create an enlightened system that would develop and grow over time.[3] Lawmakers, scholars and the judiciary were calling for sentencing reform and for a sentencing scheme that better reflected the various purposes of punishment.[4] There was

[1] 18 U.S.C. § 3551 (1984).
[2] Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1694 (1992).
[3] *Id*.
[4] *See* Marvin E. Frankel, *Lawlessness in Sentencing,* 41 U. Cin. L. Rev. 1 (1972) (Frankel's desire for change in sentencing is largely considered the genesis of the sentencing reform movement).

distaste with judges basing sentences on factors determined individually and that were reflective of irrelevant socioeconomic characteristics such as race and income.[5] There was also fear that judicial use of a seemingly endless number of factors was leading to inconsistent sentencing in similar cases.[6] Statistics showed different sentences for similar crimes, but research into the roots of the differences was insufficient, in fact most judges attributed the differences to circumstantial factors and not judicial discretion.[7] So began the obsession with consistency in sentencing to the detriment of all other related factors. In the creation of the Federal Sentencing Guidelines,[8] the focus was on standardization of the law of sentencing, most of the effort in creation of the Guidelines went to assigning fixed ranges of punishment for every crime, with fixed value and process for taking into account any surrounding circumstances.[9] "Important questions like burdens of proof, hearing procedures, and fact-finding procedures were left to the implementation of individual judges."[10] In addition, a multitude of equally important factors in punishment including rehabilitation, age, education, vocational skills, mental condition, family circumstances, and many others were deemed irrelevant.[11] What was most disturbing about the change in thought process which led to the Guidelines was that the change was not based on the fundamental concepts of fairness as initially conceived but was heavily influenced by republican political agendas such as the war on drugs, law and order, and

[5] Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 895-97 (1990).
[6] Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 915-19 (1962).
[7] Freed, *supra* note 2, at 1743.
[8] 28 U.S.C. § 994 (2004).
[9] Margareth Etienne, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 Stan. L. Rev. 309, 312 (2005).
[10] *Id.*
[11] U.S. Sentencing Guidelines Manual § 5H.1.1-1.6 (2004).

severity of punishments.[12] Although the *Booker*[13] decision made the Guidelines advisory, they are still to be used as the model of sentencing in this country and thus remain a prime example of the injustice that results from focusing on empirical consistency.

From the outset, the Guidelines were criticized for their complexity, rigidity, procedural and substantive unfairness, and their severity.[14] In addition "any marginal reduction in disparity that has come from the complexity and rigidity of the system has been more than offset by unwarranted uniformity."[15] Although the concept of sentencing guidelines could have brought organization to a very unstable and varied system, in practice there was significant injustice. This injustice came to the forefront in the recent Supreme Court decisions of *Apprendi v. New Jersey*[16], *Blakely v. Washington*[17], and *United States v. Booker*.[18] Collectively these cases established the unconstitutionality of the guidelines and rendered them advisory.[19] In the wake of *Booker, Blakely, and Apprendi* the public is now witness to the injustices of the federal sentencing guidelines, and is also presented with opportunities for improving sentencing in the future. There continues, however, to be a conservative push for statistical outcome consistency through measures such as mandatory minimum sentencing and topless sentencing ranges.[20] The next several years will present our legislature and courts with many important questions and with these questions opportunities to develop sentencing regulation that accurately

[12] Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 Stan. L. Rev. 37, 41 (2005).
[13] United States v. Booker, 543 U.S. 220, 260 (2005).
[14] David Yellen, *Saving Federal Sentencing Reform after Apprendi, Blakely and Booker*, 50 Vill. L. Rev. 163, 179 (2005).
[15] *Id.* at 186.
[16] 530 U.S. 466 (2000).
[17] 542 U.S. 296 (2004)
[18] 543 U.S. 220 (2005).
[19] *Id.*
[20] Yellen, *supra* note 14, at 174, 179.

reflects the crimes committed, is fair and flexible, yet lacks unexplainable disparities. This article explores the experiences of a federal prisoner and demonstrates the flaws in a rigid statistically based system.

A. Case Study: Roberto Natale

Statistics on the merits or injustice of a sentencing scheme based on statistical consistency are available and often presented, supporting both sides of the equation. In spite of all of the proclaimed benefits of such a rigid system, I present a case that proves otherwise, a case that shows not only how the entire sentencing process has been molded in the wake of the guidelines, but also how a statistical consistency based system in fact produces punishments unrelated to culpability. This is not a case study of a fringe case or the outlying example of injustice, but a common case with few exceptional circumstances. This case shows that under such a system, the actual crime committed and the rehabilitation and punishment for the crime are only minor factors in the sentencing analysis. Mr. Roberto Natale is a tragic and dramatic example of an offender falling prey to our sentencing system. A first time offender, Mr. Natale received 19 years of prison time[21], although it is clear that much of his time in prison had very little to do with his convicted crimes. From the onset of his sentencing it was clear the proceeding had little to do with sentencing Natale as an individual and everything to do with application of the guidelines. We enter a world where sentencing is reduced to issues of whether or not the guidelines apply, interpretation of the guidelines, and relevant conduct under the guidelines – issues that made up nearly ninety percent of Natale's sentencing hearing.

[21] Sentencing transcript at 86, United States v. Natale, No. 90-6194-CR (S.D. Fla. January 3, 1997) [hereinafter *Transcript*].

Roberto Natale, federal inmate number 29947-004, was born in Casolla Caserta Italy on June 18th 1943.[22] Mr. Natale's family was devastatingly poor and he and his brothers migrated to the United States in 1967 in search of a better life.[23] Mr. Natale was physically and mentally abused as a child, and in general had a very tough upbringing.[24] Natale had a fifth grade education and had an ongoing battle with substance abuse.[25] Unable to read, write, or speak English, Natale went from business to business begging for cleaning jobs, often times being turned away as a result of his inability to communicate.[26] After years of hard work Natale scraped together the income necessary to open his own business. Capitalizing on his knowledge of foreign cars he and his brother opened a garage that specialized in repairing these vehicles, but life was still a struggle.[27] At some point a regular customer at his garage, Bruno Sorrocco, pulled Mr. Natale into a scheme that would change the rest of his life. Sorrocco was the head of an international drug dealing operation that was very large in its reach, operating from 1979 to 1988.[28] Natale allegedly becomes a part of the conspiracy from 1985-1986.[29] Natale was never caught in commission of a crime nor was he arrested while in possession of illegal narcotics.[30] All of the charges were based on testimony of government informants who claim witness to the acts some ten years prior to the trial and themselves were drug

[22] Presentence Report at 9, United States v. Roberto Natale, (S.D. Fla. October 4, 1996) (No. 90-6194-CR) [hereinafter *Presentence Report*].
[23] *Id.*
[24] *Id.*
[25] *Id.* at 10.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 3-7.
[29] *Id.*
[30] *Id.*

dealers who were given deals for their assistance.[31] Natale was convicted of conspiracy to distribute cocaine as part of the operation and for 3 counts of possession with intent to distribute.[32]

II. Learning from Past Mistakes: The Federal Sentencing Guidelines

It is a daunting task; confining every federal crime, every circumstance, and every judicial mind interpreting these factors within a rigid framework. In practice, it makes sense only in the extreme fringes of abstract thinking. For example, at first glance, it makes sense that two individuals, A and B, convicted of trafficking 10 kilograms of cocaine should receive the same sentence regardless of where they are sentenced. But the error of this thinking is immediately apparent; it is based on the least information possible for each crime, the nature of the crime and the amount of the drug. It logically follows that the more information one has about each crime and each defendant, the more distinguishable each case becomes. For example, A is a 45 year old lawyer that uses his wife's daycare business as a front for his cocaine trade, while B is twenty years old, was a part of the child welfare system all his life, has 2 children to support, and has only an eighth grade education. The crime is the same, but do they really deserve the same sentence? I think not. Although the offense category may be the same, each of these

[31] *Id.*; When interviewing Natale he asserted that he did not know some of the informants, nearly all of the evidence against him came from these informants who themselves were given plea deals for providing information. Professor Zlotnick did extensive research of many federal prisoners and came across similar cases where the defendants continuously assert that the informants that made up the crux of the evidence against them, and were themselves culpable and lied in order to help themselves. David M. Zlotnick, *Shouting Into the Wind: District Court Judges and Federal Sentencing Policy*, 9 Roger Williams U. L. Rev. 645, 664 (2004).

[32] "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846, 963 (2000). By passing this legislation, Congress mandated conspiracy charges be subject to guideline and mandatory minimum laws based on the underlying drug crime being conspired and not conspiracy as a separate crime. Individuals are subject to drug crime penalties "even if he never had possession or even constructive possession of drugs." Zlotnick, *supra* note 31, at 653.

individuals would benefit from a sentence tailored to their circumstances. The desire for statistical consistency in sentencing has come hand in hand with a desire for rigidity, both factors raising many questions as to their effects on fairness, culpability, and the true goal of sentencing. Although consistency, and alternatively, disparity in federal sentencing is one factor in appropriate federal punishment, there are many other factors that are seemingly ignored. Most important is the fact that many offenders, although categorically similar, actually should receive different sentences.

Although the guidelines are now advisory under *Booker*, judges are still required to use the guidelines reasonably and explain any actions taken in contravention to them.[33] There remains a strong requirement to justify sentences that are not in accordance with the guidelines.[34] What the Booker decision fails to address is the reality that the entire sentencing system and related processes have been molded around the complexity of the guidelines making sentencing a very mechanical process based largely on guideline interpretation.[35] Those who are not directly involved in the process often have difficulty comprehending the rigid disregard of important factors, the complexity of the process, and the bizarre results.[36] Equally as important, the guidelines have caused the roles of prosecutors, defense attorneys, probation officers, to change dramatically.[37] The following views each of these factors individually through the eyes of Roberto Natale and demonstrates that *Booker* alone is not enough to fix the problems created by the

[33] *Booker,* 543 U.S. at 260.
[34] *Id.* at 262.
[35] Yellen, *supra* note 14, at 185.
[36] Freed, *supra* note 2, at 1728.
[37] Margareth Etienne, *The Declining Utility of The Right To Council in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 Cal. L. Rev. 425 (2004).

Guidelines. These problems also demonstrate that in the future we must move away from statistical consistency as the basis for our sentencing system.

A. The More You Know, the Harder It Gets – A Rigid System

Roberto Natale had a clean record prior to these convictions, he was not a career criminal.[38] Natale was not violent during his alleged crimes or upon being taken into custody.[39] Natale kept no weapons and was not associated with any violent men or involved in any violent events.[40] The last action he made in furtherance of the drug conspiracy occurred ten years before he was sentenced, and he had been out of the "business" for nearly that entire time.[41] Natale was fifty four years old at the time of his sentencing and faced confinement into his seventies.[42] Mr. Natale was considered a good person by his family and his community and was hardly a threat at his age. [43] Mr. Natale was living a modest life, rebuilding a relationship with his sons.[44] Mr. Natale lived a very hard and impoverished life, was abused mentally and physically as a child, and had only a fifth grade education.[45] Mr. Natale was battling with a substance abuse problem at the time of his arrest.[46] These factors are important, and some could say essential to punishing and rehabilitating a person convicted of crime. However, not one of these factors was taken into consideration in Natale's sentencing. Even if the judge were

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[38] *Presentence Report* at 9.
[39] *Id.* at 3-7.
[40] *Id.*
[41] *Id.* at 3-7.
[42] *Id.* at 2.
[43] "As far as the community is concerned…everybody would look to him as someone – you need help, he would be there to help you. He's never harmed anybody physically…he is a really good man." *Transcript* at 82. (character witness). "He never demonstrated any extravagance in wealth. I think he is an asset to the community. He was a hard-working, good person. And I think he may have had poor judgment in getting involved with the wrong people, but he certainly is not the image of what we would see as some kind of drug dealer." *Id.* at 83.
[44] *Id.*
[45] *Presentence Report* at 9.
[46] *Id.* at 10.

lenient and decided to consider that Natale was almost entirely rehabilitated at the time of sentencing, the guidelines required Natale to be sentenced between 17.5-21.5 years.[47] Not only was the sentencing judge prohibited from considering a multitude of factors seemingly essential to proper punishment, but the guidelines constrained him to move only 20% from the maximum sentence. Natale's circumstances are common, and often times even more dramatic.

> "Before we had the guidelines, one could express his true feelings. You looked at the individual, his background, his prior record, his family and all that, and you presented those facts to the judge, and the judge had to agonize over what sentence was appropriate for that individual. Now, we have to apply the guidelines not to that person, but to that crime."[48]

One of the most perplexing aspects of the guidelines is the declaration that many personal characteristics of offenders are not relevant to sentencing outside of the applicable range.[49] Congressional mandate established that factors such as education, vocational skills, employment, family responsibilities, community ties, age, mental and emotional condition, drug dependence, and dependence on crime for a livelihood were generally inappropriate factors.[50] When the sentencing commission decided to make consistent outcomes its primary objective, it had little choice but to deem personal characteristics irrelevant because in order to categorize the actions of a seemingly endless number of defendants, one must rely on the least information impossible.[51] The more factors taken into consideration in sentencing, the harder it is to fit crimes into neat categories; thus any increase in statistical consistency comes at the expense of the

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[47] *Transcript* at 86.
[48] Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 Am. Crim. L. Rev. 161, 175 (1991).
[49] 28 U.S.C. § 994(d) (2003).
[50] Freed, *supra* note 2, at 1717 (citing 28 U.S.C. § 994(e) (2003)).
[51] Yellen, *supra* note 14, at 180.

consideration of relevant information.[52] Ironically, when fewer factors are taken into consideration, the less likely it is that the sentence will match the crime.[53] As a result of the level of generality needed "[t]he guidelines largely ignore culpability by rejecting factors such as youth that judges have traditionally relied on to mitigate punishment."[54] It defies logic to rely on mechanical scoring systems, rather than by looking at the circumstances of individual cases.[55] In fact, several studies have shown that the more detailed information people are given about specific cases, the less rigid and harsh the punishments become.[56] The commission erred by trying to force the wide range of human "characters and actions into an overly engineered structure" because judges sentence more effectively if they are permitted to use all of the relevant information.[57]

Another flaw of such an impersonal system as evidenced by Mr. Natale's circumstances is that it completely disregards rehabilitation. Although we are clearly in an age of retributive punishment,[58] rehabilitation is still a major part of state systems and of the public conscious as can be evidenced through the growth of such programs as drug courts and group homes.[59] Our present system of federal guidelines, and any system rigidly centered on statistical consistency, runs afoul to the idea of rehabilitation as such programs have to be targeted to characteristics and needs of each offender thus requiring

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[52] *Id.*
[53] "Even with guidelines that incorporate differences in criminal history and role in the offense, judicial sentencing discretion remains necessary because neither Congress nor a sentencing commission can ever anticipate all the variables that might be relevant to a particular case and defendant." Zlotnick, *supra* note 31, at 667.
[54] Yellen, *supra* note 14, at 181.
[55] Tonry, *supra* note 12, at 46.
[56] *Id.*
[57] Robert Weisberg, Marc L. Miller, *Sentencing Lessons*, 58 Stan. L. Rev. 1, 7 (2005).
[58] Heaney, *supra* note 48, at 215.
[59] Michael Tonry*, Obsolescence and Immanence in Penal Theory and Policy*, 105 Colum. L. Rev. 1233, 1253 (2005).

individual sentencing.[60] Rigid systems that ignore individual offender characteristics are a large obstacle to the concept of rehabilitation of criminals.[61]

In the wake of *Booker*, the Guidelines stay intact as does the culture surrounding them and relevant information will continue to be ignored. To say that even though Mr. Natale had not committed any action in furtherance of the conspiracy for which he was convicted in over ten years was not a factor seems absolutely ridiculous. It is also illogical to ignore the fact that Natale will be seventy-two when he is released, costing the prison system thousands each year given the health issues of a man of such an advanced age. Ignoring these factors misses the connection between the individual and the crime and focuses purely on the crime. A system that ignores factors such as education, vocational skills, employment, family responsibilities, community ties, age, mental and emotional condition, drug dependence, and dependence on crime for a livelihood is barbaric in nature and far from the enlightened system that was imagined when the idea of sentencing reform sprouted in the academic community. Sentencing based purely on statistical consistency offends the basic principles of our government and constitution - the recognition of individual liberty. We must return to a system that examines offenders as individuals taking into account the unique characteristics of each person and circumstances surrounding their crimes.

B. Consistency Leads to Complexity

The Guidelines combated judicial discretion by severely restricting the ability of judges to consider the characteristics of each offender through the use of an immensely complex, narrowly tailored, restrictive system. The extent to which the sentencing

[60] Tonry, *supra* note 12, at 55.
[61] *Id.*

process has been molded around the guidelines and their complexity can be evidenced by Mr. Natale's sentencing hearing. From the beginning of his sentencing transcript it was clear that culpability for the actual crime for which Natale was convicted was only a small portion of the proceeding, and in fact was rarely mentioned. On Mr. Natale's day of sentencing, the nature of the proceeding was unclear - sentencing or guideline interpretation. The sentencing judge divided the hearing into two sections, guideline issues and traditional sentencing.[62] Stating the traditional sentencing process, actually applying the convicted crime to a prison term, would come only after interpreting and clarifying all of the guideline issues.[63] The first *seventy nine* pages of Natale's ninety one page sentencing transcript were dedicated to guideline issues; 87% of the entire sentencing hearing.[64] In addition, during the hearing, the sentencing judge made numerous mistakes, these mistakes were corrected, but only after being called to his attention by the prosecution and probation officers.[65] The judge appeared to be little more than a puppet through which the prosecutor and probation officer worked the guidelines. The time spent analyzing Natale individually, his crime, and his culpability, amounted to only a few pages devoid of any meaningful analysis.[66] Further, the analysis and reasoning provided by the court had almost nothing to do with Natale as an

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[62] *Transcript* at 2.
[63] *Id.*
[64] *Id.* at 1-79.
[65] *Id.* at 15 (Judge confused as to how managerial enhancements intertwine with the safety valve and the guidelines, prosecution and defense council help him establish how the proceeding should go forward so as to take the correct information into account at the right time.); "Would you help me out on the last point that you made?" *Id.* at 79. (Sentencing judge asking probation officer for help in deciphering the rule book as to fines and applicable sentencing ranges.); "Your honor, I don't have my statute book here, but I believe that in imposing the supervised release as to count 1, that the court is also required to impose a supervised release as to Count 4 as charged in the indictment. That's what the PSI indicates and I don't have 841 to recheck it." *Id.* at 89. (Prosecution correcting judge's interpretation of the rule book. After a pause where the judge cannot find the answer, the probation officer finally intervenes and gives the correct answer, but even so, the judge remains confused as to application of the guidelines and again makes a mistake, again corrected by the probation officer.)
[66] *Id.* at 80-88.

individual or criminal, but centered on the ripple effect of the drug trade and how this effect relates to the congressional reasoning behind the sentencing guidelines.[67]

One of the major fears of conservatives leading into the promulgation of the sentencing guidelines was that liberal judges were imposing lenient sentences based on individual factors.[68] This was believed to be the most significant reason for disparity in federal sentencing.[69] The Guidelines combated judicial discretion by severely restricting the ability of judges to consider the characteristics of each offender through the use of an immensely complex, narrowly tailored, restrictive system.[70] Technically, this meant that at each level of sentencing, the high end of the range could not be more than twenty-five percent higher than the low end of the range.[71] As a result of such a restrictive number, the guidelines had an inordinate number of ranges, forty three to be exact, and too little room to differentiate between offenders with similar offenses and very different circumstances.[72] "The degree of complexity is famously depicted by the 258 box sentencing grid."[73] The guidelines are so complex that they require "a 629-page guidelines manual with 1100 pages of appendices and more legalisms than Jarndyce v. Jarndyce."[74] On a practical level, it makes sense that an attempt to categorize a seemingly endless array of possible circumstances so as to curtail discretion would require an enormous rule structure. This level of complexity requires judges to plow

[67] "[I]t is because of [the drug trade] that Congress has established these guidelines and they are as severe as they are." *Id.* at 86.
[68] Yellen, *supra* note 14, at 165-66.
[69] *Id.*
[70] Ronald F. Wright, *Making Sense of the Federal Sentencing Guidelines, Complexity and Distrust in Sentencing Guidelines*, 25 U.C. Davis L. Rev. 617, 617 (1992).
[71] 28 U.S.C. § 994(b)(2) (2003).
[72] Yellen, *supra* note 14, at 180.
[73] Weisberg & Miller, *supra* note 57, at 16.
[74] *Id.* (quoting Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan. L. Rev. 85, 85 (2005)).

through an immense number of rules, which can divert the purpose of the sentencing hearing from a matching of culpability and punishment to a rule interpretation hearing. Complex guidelines push judges to spending most of their time deciding procedural guideline issues and increasingly less time determining what the sentence should actually be.[75]

What does all of this mean? Given the fact that judges must still calculate and consider the guidelines in sentencing even after Booker, the flaws evidenced by Mr. Natale's hearing are likely to continue.[76] For a convicted prisoner, the sentencing hearing is perhaps the second most important proceeding, behind the actual trial. One would think that an event of such magnitude should be a detailed yet thoughtful analysis by the judge, with input from counsel analyzing the life of the defendant, the factors leading to his crimes, what will best punish and rehabilitate him, and a decision which expresses the best efforts of all of the parties to give an appropriate sentence. Unfortunately, the complexity of the guidelines does not allow this. In fact, the entire sentencing hearing degenerates into a messy attempt at the correct interpretation of the guidelines, which none of the involved parties can do accurately, with the one person who should be the most knowledgeable, the judge, basically at the mercy of the prosecutors and probation officers. An event so important to the liberty of the defendant and to the policy goals of the federal government should not be relegated to a guessing game with all of the parties pouring through pages of an instruction manual. It should be a delicate balancing of factors as found at trial, and presented by the defendant as to his actual culpability. The inadequate time dedicated to Mr. Natale in this respect was an insult to his liberty as an

[75] Heaney, *supra* note 48, at 164.
[76] Steven L. Chanenson, *Guidance from Above and Beyond*, 58 Stan. L. Rev. 175, 177 (2005).

American, and an insult to every defendant that passes through the sentencing process. Because of the reverberations the Guidelines have had on the sentencing system, the entire sentencing process must be revamped in order to correct the flaws resulting from the guidelines that have now saturated the sentencing system.

C. Relevant Conduct – Real Offense Sentencing

Perhaps the most unjust aspect of the Guidelines are the relevant conduct provisions requiring judges to increase sentences based on offenses for which the defendant was not convicted, and may have in fact been acquitted.[77] Entering the sentencing hearing, Mr. Natale was looking at a sentencing level of 31; he had no criminal history points and was the prototypical safety valve defendant.[78] Given this level, his sentencing range would be 108-135 months, or a maximum of 11 years.[79] The government proceeded to introduce a multitude of hearsay evidence in order to establish that Natale was more than a minor player in the conspiracy.[80] But nearly all of the evidence focused not on the defendant, but on the actions of his co-defendant Mr. Sorrocco. This hearsay evidence lead to Mr. Natale being found a manager and required the judge to adjust Natale's sentence upward significantly.[81] Essentially, Natale was sentenced for a crime the jury did not convict him of. There was no jury trial, no rules of evidence, no cross examination on the issue of Natale's role in the offense and in fact the pre-sentence investigation stated Natale was not a manager. On the record, the judge stated that had it not been for the manager status found at sentencing, Natale would have

[77] Yellen. *Supra* note 14,
[78] 18 U.S.C 3553 (f) (2003) (Implemented to lessen the harsh sentences for non-violent first time offenders, gives direct point reduction from offense level score).
[79] U.S.S.G. § 5A, 18 U.S.C.A. (2003).
[80] *Transcript* at 61-78.
[81] *Id*.

been given the safety valve, and then proceeded to increase his offense level to 37.[82] This new offense level carried a sentence range of 210-262 months and the defendant was sentenced exactly in the middle of that range - 228 months.[83] Natale was not convicted of *managing* a drug conspiracy at trial and all of the evidence presented came from the notes of the prosecution.[84] In one flash of injustice Mr. Natale's sentence was nearly doubled.

Booker's most beneficial outcome has likely been its effect on judicial fact finding as required by the relevant conduct provisions of the Guidelines.[85] Even so, the real offense or relevant conduct aspects of the Guidelines remain very influential and the culture that encourages real offense sentencing perseveres. Judges are still required to calculate sentences as they had done before, and thus the Supreme Court has not yet abolished the real offense sentencing at issue.[86] "No other sentencing system in the world mandates that sentences be increased based on alleged additional offenses for which the defendant has not been convicted."[87] Every sentencing system in the United States except the Federal system bases offense levels on charged crimes and not on alleged 'relevant conduct.'[88] Many times this relevant conduct alone results in sentences longer than the conduct charged.[89] This is not a rare phenomenon, as data has shown that

[82] *Id.* at 78.
[83] *Id.* at 86.
[84] *Id.* at 8.
[85] *Booker*, 543 U.S. 220 (2005).
[86] David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real Offense Sentencing*, 58 Stan. L. Rev. 267, 270-72 (2005).
[87] Yellen, *supra* note 14, at 182.
[88] Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines,"* 4 Fed. Sentencing Rep. 129 (1991); Minnesota has held that real offense conduct violates due process. Freed, *supra* note 2, at 1713.
[89] Heaney, *supra* note 48, at 165.

uncharged conduct increased sentences in over one half of cases.[90] Not only do the Guidelines actually promote sentencing increases based on conduct defendants were not convicted of, often times the government takes advantage of the system by proving just enough to get to sentencing.[91] The government then relies on the lower burden of proof to obtain a longer sentence based on conduct that could not be proven at trial or earlier.[92] Relevant conduct often times does not even have to be formally charged and the defendant is often not even informed that this information would or could be used in such a manner.[93] Relevant conduct evidence may be based on hearsay evidence, sometimes even double and triple hearsay.[94] Further, a federal appeals court held that "a district judge may not refuse to consider relevant evidence at sentencing, even if that evidence has been seized in violation of the Fourth Amendment."[95] This kind of action not only offends the constitution, but it encourages law enforcement to illegally obtain evidence knowing it will be admissible at sentencing.[96] In addition, studies show that challenges to relevant conduct evidence sometimes lead to higher sentences based on findings that the defendant did not accept re*s*ponsibility.[97]

It is sometimes suggested that prior to the Guidelines, relevant conduct could be taken into consideration by judges in sentencing and without any regulation. This

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[90] *Id.* at 210.
[91] Etienne, *supra* note 9, at 318.
[92] *Id.*
[93] *Id.* at 316.
[94] U.S.S.G. § 6A1.3(a), 18 U.S.C.A. (2003) (courts can consider information at sentencing without regard to its admissibility under the rules of evidence); *See* United States v. Fortier, 911 F.2d 100, 103 (1990) (Defendant guilty of possession with intent to distribute 139 grams of cocaine, relevant conduct brought in another 249 grams based on only 2 pieces of evidence. A multiple hearsay stating that a confidential informant told an agent that a third person said the drugs belonged to Fortier, and a taped conversation where Fortier claimed ownership of cocaine but not that cocaine specifically.).
[95] Freed, *supra* note 2, at 1740 (quoting United States v. Tejada, 1992 U.S. App. Lexis 2921).
[96] *See* Saul M. Pilchen, *The Federal Sentencing Guidelines and Undercover Sting Operations: A Defense Perspective*, 4 Fed. Sent. R. 115, 115 (1991).
[97] Margareth Etienne, *supra* note 37, at 425.

argument fails for several reasons. First, judges were not required to charge the conduct and to give the severe weights assigned by the guidelines.[98] Conduct could be offset by the ability of judges to look at a variety of other mitigating factors.[99] In addition, back end review through the parole system gave the defendant and the government a separate opportunity to offset any such considerations at the front end of sentencing.[100]

The Booker decision rendered the guidelines advisory and does not require judges to make non-jury factual findings.[101] However, the relevant conduct aspects remain very influential. Judges are still required to calculate the guidelines range as they had done in the past and consider all the factors they previously had under the guidelines. The Supreme Court did not abolish relevant conduct or real offense sentencing.[102] And what about Mr. Natale? Had this constitutional violation not occurred he would no longer be in prison. *Booker* was not applied retroactively and in fact Mr. Natale was denied a re-sentencing hearing for this very reason.[103] Natale is paying the price for an unjust system and the unjust culture it has created. A clear constitutional violation resulting in nearly a decade of imprisonment will go un-remedied. Not only must the sentencing commission and congress eliminate real offense sentencing, there must be a just resolution to those convicted based on constitutional violations. Every individual who has spent even one additional day in prison due to a violation of his constitutional right deserves justice. If not, the very fabric of our Constitution and our system of government will be offended.

D. A Tainted Culture

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[98] Heaney, *supra* note 48, at 216.
[99] *Id.* at 215.
[100] 18 U.S.C. § 4205(a) (1982) (parole and good time credits repealed in 1987).
[101] *Booker,* 543 U.S. 220 (2005).
[102] Yellen, *supra* note 14, at 274.
[103] In Re Roberto Natale, 05-16635-J (11th Cir. December 23, 2005).

Mr. Natale's sentencing demonstrated an intangible change that resulted from the Guidelines and which now reverberates through the entire Federal Court System. The shift of power away from the judge and to the prosecutors and probation officers results in further unfairness to defendants and their counsel.[104] During Natale's hearing it was clear that the probation officer was the expert of the guidelines while any discretion in sentencing was left for the prosecutors.[105] In fact the judge conceded to the discretion of the probation officer on several occasions.[106] These concessions of discretion ranged from whether to depart for higher or lower sentences to unfettered belief in investigations that were based on evidence not found at trial.[107] Even more dramatic is the amount of power the prosecutors were given as they controlled the defendant's sentence and the general flow of the proceedings.[108] The defense for Natale was at the complete mercy of the prosecutor, to the point where the government controlled the defense's right to object to factual findings in the pre-sentence investigation.[109] This all took place directly in front of the judge, who failed to participate in any bargaining, although it was apparent the government was in complete control of the proceedings.[110] All of the evidence

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[104] *See* Etienne, *supra* note 37.

[105] "The defendant's role in the offence…was founded by the probation department." *Transcript* at 6; "The probation department found that….my client did not meet the criteria for the safety valve." *Id.* at 10; "The probation officer indicated and maintains that he is not entitled to acceptance of responsibility." *Id.* at 12; "Perhaps I might look to the probation department to enlighten…the court [as to applicability of the guidelines]." *Id.* at 22; "All right. Let us take a moment then and let me go back to the probation officer to ask her assistance, if she would help us out, in light of these rulings, how would that modify the calculations in the pre-sentence investigation report? Would you help me out on the last point you made, in the fine range becomes what?" *Id.* at 78.

[106] *Id*.

[107] *Id.*

[108] *Id.* at 8 (The government made it clear that if Natale objected to it's factual findings in the pre-sentence report, it would present evidence for a role enhancement, thus denying safety valve consideration). "It's the Government's position that the defendant should be – receive a three-level increase." *Id.* at 14 (showing the government is given discretion as to what the sentence will be). "I Informed [defense counsel] prior to the start of the sentencing hearing that if he was going to proceed that we would put on [evidence of role enhancement]." *Id.* at 23.

[109] *Id.* at 14.

[110] *Id.* at 7.

presented came from the notes of the prosecutors and the findings of the probation officer, not from the trial holdings.[111] Defense counsel was reduced to battling away at powers unfairly waged against Mr. Natale and a system that is clearly advantageous to the government.

The judicial discretion that many people claimed to be the cause of disparity in sentencing prior to the guidelines was merely shifted to other parties, namely prosecutors and probation officers.[112] District court judges often depend on probation officers to apply and interpret guidelines and even to resolve factual disputes.[113] Probation officers have been criticized for controlling or being guardians of guideline interpretation, and their confidential suggested sentence is often taken as law.[114] The version of the facts set forth in the pre-sentence investigation and the probation officers calculation of the sentencing range is usually just accepted by the court without question.[115] The probation officers suggestions are accepted even though they often do not attend the trial.[116] Even more alarming is that the government's files and statements constitute the primary source of evidence used at sentencing, evidence that is often inadmissible at trial.[117] Defense attorneys have been reduced to government negotiators with their primary means of accomplishing sentencing goals being conducted primarily through the government and plea deals.[118] "Although plea bargaining occurs everywhere, in the states with well-

[111] *Id.* at 41-54.
[112] Freed, *supra* note 2, at 1721-24.
[113] Federal Courts Study Comm., *Judicial Conference of the United States, Report on the Federal Courts Study Comm.* 137 (1990).
[114] Judy Clarke, *The Sentencing Guidelines: What a Mess*, Fed. Probation, Dec. 1991 at 45, 47.
[115] Heaney, *supra* note 48, at 169.
[116] *Id.* at 174.
[117] *Id.* at 172.
[118] Freed, *supra* note 2, at 1725.

designed guidelines bargaining takes place in the shadow of the guidelines and has not been characterized by widespread circumvention."[119]

The Guidelines not only are unjust by the letter of the law, but intangible changes in the power structure of the Federal Courtroom have pushed an even greater burden onto defendants. Probation officers are responsible for the majority of the sentencing interpretation while the government controls the proceedings through circumvention techniques such as plea dealing away the defense's right to object or appeal. The large majority of information shared at sentencing comes from the notes of prosecutors and probation officers and these parties together essentially decide the fate of the defendant. The judge does little more than attempt to hold this complex process together and often gets lost in the mass of rules surrounding what should be a procedurally simple sentencing hearing. These power shifts have not been corrected by declaring the Guidelines advisory. They can only be corrected by scrapping the foundation upon which the system is built, and moving away from the empirical consistency based model.

III. Statistical Consistency Does Not Equal Fairness

Before his trial, Mr. Natale was offered a plea deal that would have resulted in him receiving slightly less than six years in prison for a reduced charge. He opted to go to trial and received nineteen years, which seems very inconsistent. Consider the person who committed the same exact crime yet took the deal, now we have two identical defendants receiving vastly different sentences. This is exactly the thing the guidelines were said to be eliminating; disparities in sentences for like offenders. The reality is that

[119] Tonry, *supra* note 12, at 57.

this disparity has been shifted and hidden, and has arguably worsened given the fact that 96% of federal defendant's opt for plea deals.[120]

The unfairness inherent in a system based purely on aggregate and statistical consistency could possibly be justified if it actually resulted in the consistency that it was designed to achieve. But our guidelines system has done nothing but shift and hide disparity in sentencing, and the *Booker* decision has done nothing to address this problem. Everything that we know about the use of statistical outcome based sentencing systems has shown that they increase disparities.[121] For example, A and B were both caught sending 10 grams of cocaine through the mail. A takes a plea deal and is charged with obstruction of justice, B goes to trial and is found guilty of both possession and mail fraud. A and B are receiving different sentences for the same crime, disparity in its most basic form. Real world examples are abundant, such as illegal aliens caught crossing the Mexican border with fifty pounds of marijuana, being allowed to plea down to a charge of illegal entry.[122] Supporters of such a system often point to consistency in statistics showing that all offenders convicted of a certain crime are within a certain guidelines range, while, in reality, a large number of individuals that committed the same crime are receiving different sentences. Dubbed by many as "new disparity", disparity under the guidelines is a function of intentional coercion of guilty pleas and the degree of disparity is much greater than in the past.[123] The disparity is now hidden through statistics that rely on how often judges depart from the guidelines, and not on whether defendants who

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[120] Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers,* 56 Stan. L. Rev. 1211, 1252 (2004) (citing Admin. Office of the U.S. Courts, Judicial Facts & Figures tbl.3.5 (2004) *at* http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf (last visited March 2, 2006)).
[121] Tonry, *supra* note 59, at 1258.
[122] Heaney, *supra* note 48, at 191.
[123] *Id.* at 189.

commit the same crimes are being sentenced similarly.[124] Defendants arrested by the same law enforcement officers for the same crimes receive widely different sentences based on where they are prosecuted.[125] "The simple point is that these guidelines have not eliminated "disparities" and that no set of guidelines, no matter how faithfully applied, can do so, so long as human beings—law enforcement agents, prosecutors, probation officers, and judges—must make decisions affecting the liberty of other human beings."[126] Increased disparity is not a hidden reality, it is clearly apparent to anyone who digs only marginally into the meaning of consistency as related to our system, and it begs the question, why would we want to continue to base our punishment system on such a misleading concept?

Race disparity was another major factor in the implementation of the Guidelines.[127] In a study by Judge Heaney, pre-guidelines sentences were roughly equivalent for all males in the eighteen to thirty-five age group, with two months difference between time served for blacks and whites. But under the guidelines, blacks served almost fifty percent more time then whites.[128] In addition, the percentage of the prison population that is black has continually increased since the implementation of the guidelines.[129]

There is no disputing the reality that disparity in sentencing continues. Statistics showing that judges sentence within a certain range for a certain crime a certain percentage of the time mean next to nothing when judges are not sentencing for the actual

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[124] Katherine Oberlies, *Reviewing the Sentencing Commission's 1989 Annual Report,* 3 Fed. Sent. R. 152, 153 (1990).
[125] Heaney, *supra* note 48, at 198.
[126] *Id.* at 202-03.
[127] Nagel, *supra* note 5.
[128] *Id.* at 207.
[129] Tonry, *supra* note 59, at 1255.

crime committed. Disparity in sentencing continues, and it will always continue. The discretion once held by judges is now shifted into the hands of prosecutors who make deals in almost every case that comes before them. It seems to me that if anyone is going to have discretion to make sentencing decisions, it should be judges and not prosecutors. It begs the question, how can we accept the injustice resulting from the complexity and rigidity of a system necessary for this alleged consistency, when consistency is not what we are getting?

IV. What Does the Future Hold?

The *Booker* decision was the first step in the realization that mechanical statistically based sentencing systems, with the primary goal of consistency, cannot work in a society based on individuality. Mr. Natale shows the injustice that is inherent throughout such a system. I am not calling for a complete return to indeterminate sentencing. Sentencing guidelines can be an excellent tool if they are used correctly and are developed using the wealth of knowledge that has amassed in our judicial system. The opportunity is here for the creation of an enlightened system that accomplishes all of the goals of punishment as effectively as possible. Such a system could bring fairness and legitimacy back to sentencing.

A. Bring Back Parole

Although the original parole system was flawed, in theory, its purpose was to make an individualized assessment of the needs of each inmate and allow for release only when rehabilitation was complete.[130] Not only was this a valuable tool for managing the prison population and returning offenders to society, but it created incentive among

[130] Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines,* 28 Wake Forest L. Rev. 223, 227 (1993).

offenders to rehab themselves in hope of being released.[131] The old system, however, was unwieldy and lacked effective guidance.[132] A more controlled version of parole can offer significant benefits in the post Booker sentencing world.[133] Revamped parole guidelines could allow for a more consistent and controlled front end of sentencing, with discretion moved to the back end where it is toughest to predict outcomes at the time of sentencing.[134] As an example of the confidence in parole, notwithstanding the federal system, discretionary parole remains the most common approach to sentencing used in the United States.[135] In order to control a new system of parole, new sentencing guidelines would include a system of guidelines designed specifically for parole.[136] A parole system would be beneficial in alleviating the problems inherent in housing older, non-violent, first time offenders such as Mr. Natale. Older offenders usually present little chance of re-offending yet cost the prison system an exorbitant amount of money each year they age within the system.[137] Parole standards could be established that would mandate review upon a certain age and amount of time served, leaving the discretion as to release to a qualified reviewing body.[138] A new and improved Federal parole system would be beneficial to society as a whole by adding another check to the sentencing system to ensure that sentences are fair and effective. Discretionary parole would also help reduce the costs from an overflowing and aging federal prison population.

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[131] *Id.*
[132] Tonry, *supra* note 12, at 42.
[133] *See* Fed Cure, *Revive the System of Parole for Federal Prisoners and Increase Good Time Allowances for Federal Offenders*, *at* http://www.fedcure.org/documents/07032005-FedCURE-SUMMARY-FederalParole-FederalGoodTimeAllowances-FINAL.pdf (Last visited March 17, 2006) (Showing that the cost to house inmates increases exponentially as they ages and now costs taxpayers over seven billion annually. Reviving a parole system could save taxpayers two billion per year while releasing non violent first offenders).
[134] Chanenson, *supra* note 76, at 175.
[135] *Id.*
[136] *Id.* at 187.
[137] *Id.* at 188-93.
[138] *Id.*

B. New Guidelines

"Congress and the commission can do better this time if they attend more closely to the overt functions the sentencing machinery is expected to perform and if they restrain themselves from use of sentencing and sentencing reform to pursue latent goals only incidentally related, or unrelated, to imposition of just and appropriately preventive punishments."[139] The new guidelines should be mandatory not advisory, and they should bind judges in a similar fashion as higher court precedents, thus when there is a reasonable distinguishable case, the judge should be able to exercise discretion.[140] Statistics could be used to provide judges with guidance as to how similar defendants are being sentenced around the nation. Another necessity of a new guidelines system is that it not be overly complex and that it have far fewer, but larger ranges. For example, Minnesota has ten ranges, compared to the federal system's forty three.[141] Wider ranges will give the judge an appropriate level of discretion. The new guidelines must also encourage departures from the guidelines to "accommodate cases of greater and lesser seriousness."[142] The guidelines must allow consideration of characteristics of the defendant as a person including things such as age, education, and family and community ties, and non violent offenders, factors which are now prohibited.[143] Real offense sentencing or relevant conduct mandatory sentencing should be eliminated from any future guidelines as they are a clear violation of several constitutional rights.[144] Less complex guidelines that take into account individual characteristics of offenders and that

[139] Tonry, *supra* note12, at 42.
[140] *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 945 (1991).
[141] Sentencing Guidelines, guideline II, subd. A, M.S.A. ch. 244 App. (2005)
[142] Freed, *supra* note 2, at 1683.
[143] *Id.* at 1751.
[144] *Id.*

prohibit real offense sentencing would likely return the discretionary power in sentencing to judges, removing it from the hands of prosecutors and probation officers. New guidelines should also attempt to better meet an initial mandate of the sentencing reform act – to limit overpopulation of federal prisons.[145] Sentencing reform would also benefit from a reevaluation of the sentencing commission, ensuring that it does not rely too heavily on statistical outcomes and also ensuring that it is mandated to use the expertise of federal judges by working directly with the judiciary.[146]

The new guidelines must better incorporate the concepts of rehabilitation and non-prison alternatives. Home confinement, drug rehab confinement, community service, mandatory restitution, and others are considered to affect recidivism just as equally as prison and may be more beneficial to society.[147] In fact, studies have shown the effectiveness of a large number of treatment programs.[148] Programs such as anger management, cognitive skills, sex-offender treatment, as well as vocational training have been shown to reduce recidivism.[149] Some other considerations should be elimination of sentence appeal waivers, better data analysis and release, and encouragement of more detailed sentence explanation by judges.[150]

Most importantly, as professor Tonry stated in a recent article, "overly rigid, overly detailed guidelines do not work well. Experience with state guidelines shows that guidelines can at the same time provide meaningful guidance on appropriate sentences

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[145] 28 U.S.C. § 994(n) (1988).
[146] Freed, *supra* note 2, at 1750.
[147] Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Non-prison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339, 340-41 (2005).
[148] *See generally* M. Douglas Anglin & Yih-Ing Hser, *Treatment of Drug Abuse*, 13 Crime & Just: A Review of Research 393, 393-460 (1990); Mark W. Lipsey, David B. Wilson, and Lynn Cothern, *Effective Intervention for Serious Juvenile Offenders*, Juvenile Justice Bulletin (April 2000).
[149] Gerald G. Gaes, Timothy F. Flanagan, Laurence L. Motiuk, and Lynn Stewart, *Adult Correctional Treatment,* 26 Crime & Just. 361, 361-426 (1999).
[150] Chanenson, *supra* note 76, at 182-85.

for typical cases while allowing judges and counsel sufficient flexibility to adjust sentences to take account of particular ethically relevant circumstances in individual cases."[151] As an experiment, I sentenced Mr. Natale under the Minnesota Guidelines. In doing so I found that not only would the sentence have been significantly less severe with a presumptive sentence of seven years, the judge would have had a reasonable amount of discretion to move up or down from the presumptive sentence, and encouragement to depart even further when necessary.[152] Working with the Minnesota system is simple and intuitive, providing meaningful guidance without being overly restrictive. The Federal system could benefit significantly by following in the footsteps of Minnesota and many other states that have effective sentencing guidelines.

C. Stop Mandatory Minimums

Mandatory minimum sentences and related topless sentences are unaffected by Booker and are some of the harshest and the most unenlightened forms of sentencing available.[153] Mandatory minimums, like the Guidelines, are overly severe and rigid and are in conflict with the goals of justice, consistency, and discretion that are necessary in a sentencing system.[154] The continued use of mandatory minimums runs contrary to all of the goals laid out in this article. Mandatory minimums suffer from the same problem as

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[151] Tonry, *supra* note 12, at 51.
[152] Sentencing Guidelines, guideline II, subd. A, M.S.A. ch. 244 App. (2005) (Natale, with a first degree conspiracy charge and no criminal history would receive a presumptive sentence of 86 months. The judge is free to adjust down to 74 months or up to 103 months. Further, the judge could depart further if circumstances allow. Not only is this system more in line with what seems socially acceptable for first time non-violent offenders, it inherently allows judges to consider a multitude of important factors while at the same time constraining him or her within a reasonable range. Comparing the federal crime range to Minnesota's, Natale's Federal sentence is equivalent to the crime of 2nd degree murder with a criminal history score of 6, which is the highest possible criminal history score, to be applied to an extremely violent crime and offender. Even if Natale were sentenced within such a range in Minnesota, the discretion ranges increase substantially at this level to 192-270 months, giving a judge a range of nearly 7 years in which to account for variances in the more severe crimes.)
[153] *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993).
[154] Yellen, *supra* note 14, at 179.

the Guidelines, heavy reliance on the least possible information about a defendant.[155] For example, in drug cases the only factor used for application of the mandatory minimum is drug quantity, no other factor is even considered.[156] The most recognized failure of reliance on only one factor has been termed the "cliff effect." Defendants who have a quantity of drugs only slightly below the cut off quantity for the mandatory minimum sentence are sentenced at significantly lower levels then those with quantities only slightly above.[157] The path is familiar, this harsh, rigid, unintuitive scheme leads to disparity, unfairness, and circumvention through excessive plea deals - many of the same problems found in the Guidelines. The problem with mandatory minimums is best summed up in a speech by George Bush senior in 1970 introducing a bill to eliminate mandatory minimums.

> "Contrary to what one might imagine, however, [eliminating mandatory minimums] will result in better justice and more appropriate sentences. For one thing, Federal judges are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion….this is particularly true in cases where addict possessors who sell to support their habits are involved, and a great deal of plea bargaining in this area results…..Philosophical differences aside, practicality requires a sentence structure which is generally acceptable to the courts, to prosecutors, and to the general public."[158]

Conclusion

During the past decade the prison population in America has more than doubled and is substantially higher than any other nation in the world.[159] Non-violent crimes such as drug crimes result in more severe sentences than sexual abuse, manslaughter, and

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[155] Weisberg & Miller, *supra* note 57, at 34.
[156] *Id.*
[157] *Id.* at 35.
[158] *The 1970 Views of Congressman George Bush on the Wisdom of Mandatory Minimum Sentences,* 3 Fed. Sent. R. 108 (1990).
[159] Aschuler, *supra* note 140, at 929-31.

assault.[160] In a Federal Courts Study during the 1990s, out of 270 witnesses, 266 voted against the Guidelines and their focus on severity and rigidity, all of them judges, the four in favor were three sentencing commissioners and the Attorney General.[161] In general, large segments of the legal community have expressed disgust with the harsh mechanical nature of the Guidelines and similar systems.[162] One would think that the large outcry from the academic community and the judiciary would quell this desire for consistency, but a recent speech by Attorney General Alberto Gonzales was rife with all the same buzz words and concepts and called for a system of mandatory minimum topless guidelines.[163] One statistic in particular stands out as showing that the guidelines are not in line with what society considers fair punishment. The average time served under the Guidelines is more than twice that served for a pre-guidelines sentence.[164] The average sentences of all the sentencing judges would seem to show a judicial consensus as to what our judges and thus society consider to be adequate. Doubling this number is clearly a forced increase above the societal norm. And even worse, a defendant who as Mr. Natale did, decides to go to trial, on average will have their sentence doubled.[165] Not only is this contrary to judicial norms, but studies have shown that the punishment under rigid systems or mandatory minimums are more severe than the general public would call for.[166]

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[160] Tonry, *supra* note 12, at 56.
[161] Federal Courts Study Com., *Report of the Federal Courts Study Committee* 135, 142 (1990).
[162] Zlotnick, *supra* note 31.
[163] Federal Sentencing Guidelines Speech by Attorney General Alberto Gonzales, 17 Fed. Sent. R. 324 (June 21, 2005).
[164] Heaney, *supra* note 48, at 165.
[165] *Id.* at 220.
[166] Linda Drazga Maxfield, Willie Martin, and Christine Kitchens, *Just Punishment: Public Perceptions and the Federal Sentencing Guidelines* 3, 5 (1997), *available at* http://www.ussc.gov/publicat/justpun.pdf.

The federal obsession with disparity has been called pathological and is unwise given the clear lack of understanding as to what disparity actually means.[167] The average objective person would consider it unjust if "they or a family member received a long prison sentence not because the offense inherently warranted it but because a law requiring that sentence was enacted for reasons having nothing to do with just punishment or crime control."[168] Injustice in the case of Mr. Natale, or in any one case, cannot be ignored even if it is a statistical anomaly. Every single instance of injustice is a deprivation of the liberties guaranteed by our Constitution. Any future action by congress aimed at correcting sentencing must abandon the obsession with disparity and focus on culpability. Disparity in sentencing will never be eliminated, and focusing on disparity as the prime goal of sentencing results in various forms of injustice. Rendering the guidelines advisory under *Booker* is a step in the right direction, but "no matter how much weight is given to the Sentencing Guidelines and how often judges follow them, they are still the same deeply flawed Guidelines."[169] The Federal Sentencing Guidelines, built around statistical consistency, had a ripple effect that molded the entire sentencing process in its wake. Our experience with such a system demonstrates that we must follow a different path into the future and although *Booker* is a positive step, alone it is not enough to cure the deep rooted flaws in the Federal sentencing system.

In the end, it is people like Roberto Natale who are suffering the consequences of the desire for consistency and severity in sentencing. I felt it was only fitting to end with his view on sentencing.

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[167] *Id.* at 186.
[168] Tonry, *supra* note 12, at 43.
[169] Yellen, *supra* note 14, at 185.

"I felt like a baby lamb surrounded by a pack of wolves. Everything was stacked against me, the government, they do these cases every day, they had control. I went in [to sentencing], and was supposed to get 5-10 years, and I could maybe accept that, even though this evidence against me, it was all from other guilty people. You think they would look at that, that the evidence was not strong, that I had a clean record, that I was a good person and that for years I had not been involved with these people, that my education was not good, that I was going to be so old when I got out. You think these would be things that would help me, but instead they say I am a manager. Out of nowhere I get double time, all from [government facts], there was no trial and they add on all that time. Everyone knew it then, that the new law (the guidelines) was not fair, and I saw why, it was a show, to give the [prosecutors] control, to make examples of people like me, with low education and everything against me. It was not fair, and I didn't know how to express it then because I was scared of going to jail, and now these cases (booker) say that what happened to me is not fair. But it continues to be a show, these cases are no help to me, they admit my rights are violated, but I still have to deal with it. But it is done now, I have accepted it, I just want to make sure it doesn't happen again, to anyone else."[170]

[170] Interview with Roberto Natale (Mar. 8, 2006).