COMMENTS

Booker's Unnoticed Victim: The Importance of Providing Notice Prior to Sua Sponte Non-Guidelines Sentences

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INTRODUCTION

United States v Booker[1] announced a constitutionally requisite division of labor between Congress, judges, and juries in federal sentencing: it is for Congress to define offenses and their potential penalties; for juries to determine if the prosecution proved that a defendant committed the charged offense, and for judges to impose sentences at or below the statutory maximum.[2] Within this scheme, judicial factfinding that determines the statutory sentencing range under the Federal Sentencing Guidelines encroaches on the jury's constitutional domain.[3]

Prior to *Booker*, sentencing was largely constrained by Federal Sentencing Guidelines ranges,[4] though the particular range applicable in a given case was determined by judicial factfinding as to an offender's criminal history and the severity of the offense.[5] By down-

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1 543 US 220 (2005).

2 See id at 232–44. For a concise summary of early cases construing the Sixth Amendment to require this division of labor, see Jon Wool, *Aggravated Sentencing:* Blakely v. Washington*: Legal Considerations for State Sentencing Systems*, Vera Institute of Justice, State Sentencing and Corrections, Policy and Practice Review 3–10 sidebar (Sept 2004), online at http://www.vera.org/publication_pdf/250_477.pdf (visited July 7, 2007).

3 See *Booker*, 543 US at 232 (confirming "the defendant's right to have the jury find the existence of any particular fact that the law makes essential to his punishment") (internal quotation marks omitted).

4 "Federal Sentencing Guidelines" refers to a "Guidelines Manual" published by the United States Sentencing Commission, an independent agency charged by statute with developing sentencing ranges for federal criminal offenses. See Sentencing Reform Act of 1984, codified as amended at 18 USC § 3551 et seq (2000) and 28 USC § 991 et seq (2000).

5 See *Booker*, 543 US at 236–38:

> The effect of the . . . enhanced sentencing ranges . . . was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, that determined the upper limits

grading the Federal Sentencing Guidelines ranges from mandatory to advisory,[6] *Booker* made judicial participation in determining the applicable range constitutionally inoffensive.[7] *Booker* thus struck a compromise between clearly expressed congressional intent to involve judges in the determination of the applicable Guidelines range and the Sixth Amendment's prohibition on judicial determination of the sentencing range maximum.[8]

Prior to *Booker*, Rule 32(h) of the Federal Rules of Criminal Procedure required courts to provide notice (and an opportunity to comment[9]) before sua sponte imposing a non-Guidelines sentence. Since *Booker*, courts have diverged on whether notice prior to a sua sponte non-Guidelines sentence is still required. Courts have identified two statutory bases for deviating from Guidelines sentences. Section 3553(b)(1) of Title 18 allows a court to sentence outside the Guidelines if it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Non-Guidelines sentences imposed pursuant to § 3553(b)(1) are termed departures.[10] As Part II.A will explain, *Booker* excised 18 USC § 3553(b)(1). A second basis for non-Guidelines sentences is found in 18 USC § 3553(a).[11] Non-Guidelines sentences based on considerations of § 3553(a) factors have been termed variances.[12]

Since *Booker*, courts have considered two questions: (1) whether courts should provide notice and an opportunity to comment prior to sua sponte departures; and (2) whether courts should provide notice and an opportunity to comment prior to sua sponte variances. The circuits have come to varying conclusions on both questions. This Comment argues: (1) the first question is moot because *Booker* excised § 3553(b)(1), thus obviating the legal concept of a departure; and (2) notice should be provided prior to sua sponte variances.

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of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance.

6 See id at 245 (making the Guidelines "effectively advisory").

7 See id at 259.

8 See id at 265.

9 Notice without an opportunity to comment would hardly help the court or parties. This Comment therefore uses "notice" to mean notice followed by an opportunity to comment.

10 See, for example, *United States v Mejia-Huerta*, 480 F3d 713, 720 (5th Cir 2007) (explaining the difference between departures and variances).

11 See *Booker*, 543 US at 259–60 ("Without the 'mandatory' provision [18 USC § 3553(b)(1)], the [Sentencing] Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals [embodied in 18 USC § 3553(a)].").

12 See, for example, *United States v Sitting Bear*, 436 F3d 929, 932 (8th Cir 2006) (defining the term variance as referring to "a non-Guidelines sentence . . . based upon the district court's review of the case and [the defendant's] history in light of all of the § 3553(a) sentencing factors").

The first question requires some careful navigation between constitutional law, sentencing statutes, and the Sentencing Guidelines, but is unambiguous. *Booker* explicitly excised the statutory basis for departures[13] and declared that all "statutory cross-references [were] consequently invalidated."[14] Thus far, only the Seventh Circuit has discontinued use of the departure concept.[15] The analysis leading to the rejection of the departure concept in the Seventh Circuit, however, did not rely on the excision of § 3553(b)(1) but on the excision of § 3742(e).[16] The latter excision far from implies the obsolescence of departures.

The certainty of the answer to the second question—whether notice should be provided prior to sua sponte variances—varies across jurisdictions. Some circuits have required trial courts to make a conclusion of law that a Guidelines sentence would be inadequate prior to imposing a variance.[17] In such circuits, Federal Rule of Criminal Procedure 32(i)(1)(C) requires a court to give parties an opportunity to comment on "matters relating to [the] appropriate sentence." Decided over ten years before *Booker*, *Burns v United States*[18] held that a judicial conclusion substantively identical to a variance constituted a "matter[] relating to the appropriate sentence."[19] *Burns* also observed that the absence of notice would implicate defendants' due process rights.[20] Even without this constitutional question, in those post-*Booker* jurisdictions where a judge must first calculate the Guidelines range and then determine if the other § 3553(a) factors warrant a non-

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13 See *Booker*, 543 US at 259 (severing and excising "the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range [ ] in the absence of circumstances that justify a departure").

14 Id.

15 See *United States v Walker*, 447 F3d 999, 1006–07 (7th Cir 2006) (holding FRCrP 32(h), requiring notice prior to a "departure" from a sentencing requirement, inapplicable to a district court's imposition of a sentence above the maximum specified by the guidelines because the enhanced sentence was a "variance," not a "departure").

16 See, for example, *United States v Johnson*, 427 F3d 423, 426 (7th Cir 2005) ("[F]raming of the issue as one about 'departures' has been rendered obsolete by our recent decisions applying *Booker*. It is now clear that after *Booker* what is at stake is the 'reasonableness' of the sentence, not the correctness of 'departures.'"). This "reasonableness" inquiry on appeal is drawn directly from *Booker*'s discussion of § 3742(e). See *Booker*, 543 US at 260–61.

17 See note 80 for a discussion of these cases, which include *United States v Claiborne*, 439 F3d 479, 480 (8th Cir 2006); *United States v Hughes*, 401 F3d 540, 546 (4th Cir 2005); *United States v Crosby*, 397 F3d 103, 113 (2d Cir 2005).

18 501 US 129 (1991) (concluding that a district court cannot, consistent with FRCrP 32(a)(1), make an upward departure from the Sentencing Guidelines without first notifying the parties).

19 Id at 136, quoting FRCrP 32(a)(1).

20 See 501 US at 136 ("'The right to be heard has little reality or worth unless one is informed' that a decision is contemplated."), quoting *Mullane v Central Hanover Bank and Trust Co*, 339 US 306, 314 (1950).

Guidelines sentence, Rule 32(i)(1)(C) as construed by *Burns* requires notice.[21]

Those circuits that apply the § 3553(a) factors concurrently in a single multifactor balancing scheme do not require a judge to make a legal conclusion that the Guidelines range is insufficient before imposing a non-Guidelines sentence.[22] In such circuits, a judge must still consider the Guidelines range, but need not make a separate determination whether a Guidelines sentence would adequately punish the offense. A narrow reading of *Burns* in such jurisdictions would not require notice, as no distinct matter comparable to the conclusion that a non-Guidelines sentence was warranted would arise prior to imposition of the sentence. A broader reading of *Burns* that accounts for that case's stated goals of effecting the adversarial scheme of Rule 32 and of avoiding due process violations suggests that trial courts across all circuits should afford parties notice before imposing non-Guidelines sentences, as was done pre-*Booker*. Indeed, such a notice requirement might be especially appropriate following *Booker* in order to reduce the twin threats of inaccuracy and fact bargaining. When a judge rejects a plea bargain and imposes, sua sponte, a non-Guidelines sentence without providing parties an opportunity to dispute her reasoning, she places the bargaining parties in a precarious position: they must craft stipulated facts in a manner that provides no conceivable basis for overturning their bargain or risk the imposition of a sentence substantially different from that on which the parties agreed.

I. BACKGROUND

The Sentencing Reform Act of 1984[23] (Act) enabled the United States Sentencing Commission to establish and periodically revise Federal Sentencing Guidelines.[24] Probation officers were tasked with investigating the facts of an offense and the history of the offender, which the Guidelines mapped to narrow sentencing ranges.[25] Sentences were constrained to the range specified by the Guidelines absent a judicial finding that features of the particular offender or offense were not adequately accounted for by the Guidelines range and

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21 Such sentencing procedures will be termed "multistage" in reference to the sequence of determinations that a judge must make prior to imposing a non-Guidelines sentence.

22 This style of sentencing procedure will be termed parallel, as sentencing factors are considered in parallel instead of sequentially under the multifactor test.

23 Pub L No 98-473, ch II, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq (2000) and 28 USC § 991 et seq (2000).

24 See 28 USC § 994.

25 See generally *Booker*, 543 US at 250–51.

that a departure was therefore in order.[26] *Burns* required a judge to notify parties prior to sua sponte departing from the mandatory Guidelines range. *Booker* demoted the Guidelines to the status of "effectively advisory," directing judges to consider the other sentencing goals proposed in § 3553(a) alongside the Guidelines range.[27] This Part expands the above summary of sentencing procedures and explains how they were affected by *Booker*.

A. Sentencing under the Federal Sentencing Guidelines Pre-*Booker*

Federal criminal statutes define elements of an offense and prescribe sentencing ranges. These ranges are frequently broad in order to accommodate the diversity of crimes and criminals, thus supplementing oftentimes sparse elemental definitions.[28] Prior to the Act, judges enjoyed broad discretion over sentencing within the statutory range.[29] The combination of broad statutory ranges and discretionary sentencing posed troubling possibilities of arbitrary or discriminatory sentencing.[30] The Act was designed to reduce such unwarranted disparities.[31] It authorized the United States Sentencing Commission, "an

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26 See 18 USC § 3553(b) ("[T]he court shall impose a sentence of the kind, and within the range [provided by the Sentencing Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.").

27 See 543 US at 259.

28 Consider, for instance, the sentencing range for possessing at least fifty grams of cocaine with intent to distribute, which spans from ten years to life. 21 USC § 841(b)(1)(A) (2000).

29 See United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 7 (Nov 2004), online at http://www.ussc.gov/15_year/15year.htm (visited July 7, 2007) ("Fifteen Years Report") ("As it developed, sentencing reform legislation shifted from a model that continued significant discretion for sentencing judges toward a model of sharply limited discretion."). Scholars have associated the shift from indeterminate to Guidelines sentencing with the ascension of probabilistic thought, emphasis on incapacitation over rehabilitation, and a new resource management strategy for our anticrime bureaucracy. See, for example, Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-first Century*, 70 U Chi L Rev 105, 106–13 (2003) (discussing the forces responsible for pushing the criminal justice system toward "mandatory sentences, fixed guidelines, and sentencing enhancements for designated classes of crimes").

30 See *Booker*, 543 US at 329 (Breyer, joined by Rehnquist, O'Connor, and Kennedy, dissenting) (noting "the congressional efforts to create a sentencing law that would mandate more similar treatment of like offenders, that would thereby diminish sentencing disparity, and that would consequently help to overcome irrational discrimination (including racial discrimination) in sentencing").

31 See Fifteen Years Report at 11 (cited in note 29) (explaining that only disparity correlated with the "seriousness of [the] crime[] or . . . offender characteristics" may be properly called fair).

independent agency that exercises policy-making authority delegated to it by Congress,"[32] to elaborate on the capacious elementary definitions of offenses.[33] The Commission developed sentencing factors that particularized offenses for sentencing purposes.[34] These factors located each offender on two dimensions—severity of the offense and criminal history—and mapped each location to a narrow sentencing range.[35]

Under the mandatory Guidelines, § 3553(b)(1) provided the only[36] basis for sentencing outside the applicable Guidelines range. The provision required the judge to conclude "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."[37] In delivering the sentence, the judge was required to state the "specific reason for the imposition of a sentence different [from the Guidelines sentence,] . . . which reason[] must also be stated with specificity in the written order of judgment."[38]

The Guidelines acknowledge that the sentencing ranges are designed for typical offenders and offenses[39] and provide a nonexhaustive enumeration of circumstances that may warrant departure.[40] For example, § 5K2.1 of the Guidelines proposes that if an offense results in death, then an upward departure may be appropriate.

United States v Edwards[41] illustrates application of Guidelines sentencing and the enumerated grounds for departure after *Booker*. Isreal Edwards was convicted for being a felon in possession of a firearm in violation of 18 USC § 922(g)(1).[42] Edwards' conviction followed a gun battle between his and an opposing gang at a rap concert, which injured several bystanders and claimed the life of sixteen year old

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32 *Booker*, 543 US at 243.

33 See 28 USC § 994.

34 See generally United States Sentencing Commission, *Guidelines Manual* (2006), online at http://www.ussc.gov/2006guid/gl2006.pdf (visited July 7, 2007) ("USSG").

35 See USSG § 5A Sentencing Table.

36 Federal sexual offenses and crimes against children received special treatment under § 3553(b)(2).

37 18 USC § 3553(b)(1).

38 18 USC § 3553(c)(2).

39 See Frank O. Bowman III, Roger W. Haines, Jr., and Jennifer C. Woll, eds, *Federal Sentencing Guidelines Handbook* 8–9 (West 6th ed 2006) (explaining that the Guidelines ranges were designed for typical crimes and courts should consider departures pursuant to § 3553(b) in atypical cases).

40 See USSG §§ 5K2.0–5K2.23 (enumerating common aggravating and mitigating factors). The Guidelines propose forbidden, discouraged, and encouraged grounds for departure. In *Koon v United States*, 518 US 81, 96 (1996), the Supreme Court held that sentencing courts should defer to the Commission's classification and never use a forbidden factor as grounds for departure.

41 2004 US App. LEXIS 7395 (5th Cir).

42 Id at *2.

Tatum Strogen.[43] Though Edwards was found to have been "involved in the gun battle, the bullet that killed Strogen did not come from his gun."[44] Based on his criminal history and the offense, the applicable Guidelines range was seventy to eighty-seven months.[45] The court, however, imposed an upwards departure on the basis of Strogen's death. Finding that Edwards' "actions in taking a pistol to the concert, brandishing it during a firefight, and firing it into a crowded area, significantly contributed to the course of events that resulted in Tatum Strogen's death,"[46] the trial court sentenced Edwards to the statutory maximum of 120 months.[47]

B. Participation in Sentencing Determinations and *Burns*

Rule 32 of the Federal Rules of Criminal Procedure "provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence."[48] Development starts with a probation officer, who conducts an investigation and submits a presentence report to the court.[49] That report identifies all "factor[s] relevant to the appropriate kind of sentence, or . . . the appropriate sentence within the applicable sentencing range."[50] The report also prepares inputs for determining a sentence under the Guidelines, including a calculation of "the defendant's offense level and criminal history category"[51] and "any basis for departing from the applicable sentencing range."[52] At least thirty-five days prior to sentencing, the report is submitted to the defendant, the defendant's attorney, and the prosecutor,[53] who are given fourteen days to review the report and submit their comments and objections to the probation

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43 Id.

44 Id.

45 Id.

46 Id at *7.

47 Id. In affirming the district court's upward departure, the Fifth Circuit noted that Edwards's case "falls outside the heartland of typical felon-in-possession convictions." Id.

48 *Burns*, 501 US at 134.

49 See FRCrP 32(c)(1)(A). The presentence investigation culminating in the presentence report may be avoided if 18 USC § 3593(c) so provides or if "the court finds that the information in the record enables it to meaningfully exercise its sentencing authority . . . and the court explains its finding on the record." FRCrP 32(c)(1)(A).

50 FRCrP 32(d)(1)(D).

51 FRCrP 32(d)(1)(B).

52 FRCrP 32(d)(1)(E). See also Deborah Young, *Fact Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 Cornell L Rev 299, 322–32 (1994).

53 FRCrP 32(e)(1). Rule 32(i)(1)(A) mandates that the court verify that the parties have received and read the report. See *United States v Miller*, 849 F2d 896, 896 (4th Cir 1988).

officer and the opposing party.[54] The probation officer may investigate any contentions and revise the presentence report accordingly. Finally, the report, indicating whatever disputes remain unresolved, is submitted to the judge, who may hold mini-hearings prior to ruling on the disputes. At sentencing, the judge "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence."[55] The process was designed to "maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing."[56] However intricate, the rule's specified presentence procedure proved incomplete. In *Burns*, the Supreme Court resolved a gap in Rule 32(i)(1)(C), which requires the court to provide "parties' attorneys [an opportunity] to comment on the probation officer's determinations and other matters relating to an appropriate sentence."[57] The question presented was whether a court's sua sponte decision to depart upwards from a Guidelines sentence was an "other matter[] relating to an appropriate sentence"[58] within the meaning of the rule. The court concluded that it was, supporting its conclusion with Rule 32's intent to "promot[e] focused, adversarial resolution of legal and factual issues, relevant to fixing Guidelines sentences" and by invoking the doctrine of constitutional avoidance, which favors constructions that do not raise questions of constitutional propriety.[59] To avoid potential due process violations, the Court imputed to Congress the intent to provide parties an opportunity to be heard prior to depriving them of liberty or property absent explicit statutory language to the contrary.[60] Because notice is a traditional prerequisite to meaningful exercise of the right to comment, *Burns*

54 FRCrP 32(f)(1). Failure to inform the defendant of the factual basis for his sentence is grounds for overturning it on review. See, for example, *United States v Meeker*, 411 F3d 736, 744 (6th Cir 2005).

55 FRCrP 32(i)(1)(C), formerly codified at FRCrP 32(a)(1).

56 FRCrP 32 Advisory Committee Notes (1994 Amendment). See also USSG § 6A1.3, proposing that if "any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."

57 See *Burns*, 501 US at 135.

58 FRCrP 32(i)(1)(C).

59 *Burns*, 501 US at 137–38 ("In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause. Because Rule 32 does not clearly state that a district court sua sponte may depart upward from an applicable Guidelines sentencing range without providing notice to the defendant we decline to impute such an intention to Congress.").

60 See id ("Notwithstanding the absence of express statutory language, this Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals *both* notice *and* a meaningful opportunity to be heard.").

concluded that notice was required prior to sua sponte departure.[61] In 2002, Congress codified *Burns* in Rule 32(h), expanding the requirement of notice to sua sponte departures downwards as well as upwards from the applicable range.[62]

C. Determining a Sentence post-*Booker*

In *Booker*, a five-justice majority held that mandatory sentencing under the Guidelines violated the Sixth Amendment.[63] The operative construction reserved all factfinding prerequisite for determining statutory maxima to the jury.[64] So long as Guidelines sentencing ranges determined statutory maxima, a judge resolving disputes as to sentencing factors invaded the jury's domain.

One way to stop an invasion is to withdraw the border. Accordingly, another five-justice majority[65] excised two provisions: § 3553(b)(1), "the provision that requires sentencing courts to impose a sentence with the applicable Guidelines range (in the absence of circumstances that justify a departure)"[66]; and § 3742(e), which "set[] forth standards of review on appeal, including de novo review of departures from the applicable Guidelines range."[67] With the excisions, the Guidelines have become "effectively advisory"[68] and sentences outside the Guidelines range are to be reviewed for unreasonableness.[69] Now that the range calculated under the Guidelines is only advisory, judicial findings of sentencing factors determining that range no longer impermissibly determine the statutory maximum.

The excision of § 3553(b)(1) "requires judges to take account of the Guidelines together with other sentencing goals" when imposing a sentence.[70] These "other sentencing goals" appear in § 3553(a), which directs that the sentence be "sufficient, but not greater than necessary" to achieve retributive, deterrent, incapacitative, and rehabilita-

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61 See id.

62 See FRCrP 32 Advisory Committee Notes (2002 Amendment).

63 543 US at 245.

64 See id at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

65 Only Justice Ginsburg joined both majority opinions, which together invalidated sentencing under the Guidelines as unconstitutional and yet retained Guidelines sentencing in its entirety save for its mandatory nature.

66 *Booker*, 543 US at 259.

67 Id at 258.

68 Id at 245.

69 See id at 260–61 (holding that § 3742(e) standards of review, including the de novo standard applied to departures, were to be replaced with review for unreasonableness).

70 Id at 259.

tive penal goals.[71] Additionally, the sentence should reflect the nature and circumstances of the offense and the history and characteristics of the defendant, the kinds of sentences available, any pertinent policy statements, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to any victims of the offense.[72]

Isreal Edwards, whose case was discussed in Part I.A,[73] could receive the same sentence post-*Booker* pursuant to § 3553(a). While considering the seventy to eighty-seven month Guidelines range, the judge may impose a higher sentence to, for example, reflect "the seriousness of the offense" and accomplish its "adequate deterrence."[74] Because not every felon possessing a firearm chooses to discharge it into a crowd, the nature and circumstances of the *Edwards* case are atypically reprehensible.[75] And there is a strong argument that society is less interested in deterring felons who keep guns in their holsters than those engaging in gun battles in public. It is also easy to imagine why there may be an extraordinary need "to protect the public from further crimes of the defendant"[76] given the established history of violent gang participation. This example illustrates that *Booker*'s demotion of the Guidelines to "advisory" does not necessarily lead to different sentencing outcomes. Indeed, post-*Booker* empirics reveal that the rate of non-Guidelines sentencing has increased only moderately.[77]

While *Booker* may have had little impact on sentencing outcomes, it has noticeably affected sentencing procedure and vocabulary. Pre-*Booker* non-Guidelines sentences were based on findings of departures pursuant to § 3553(b)(1) and the Guidelines. Immediately after *Booker*, judges were to consider any of the factors in § 3553(a) without any guidance as to how those factors should be weighed.[78]

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71 See 18 USC § 3553(a)(2)(A)–(D) (enumerating four specific sentencing goals that a court "shall" consider in imposing a sentence).

72 See 18 USC § 3553(a)(1)–(7). See also *Booker*, 543 US at 259 (emphasizing the importance of § 3553(a) factors as supplements to Guidelines ranges in sentencing).

73 See generally *Edwards*, 2004 WL 830787.

74 See 18 USC § 3553(a)(2)(A)–(B).

75 See *Edwards*, 2004 WL 830787, at *2 (noting that Edwards's participation in a gun battle in a crowded theater "falls outside the heartland of typical felon-in-possession convictions").

76 18 USC § 3553(a)(2)(C).

77 Nationally, 62.2 percent of sentences fell within the Guidelines range between *Booker* and February 1, 2006. Compare that number with figures for 2001, 2002, 2003 and 2004 when 64.0 percent, 65.0 percent, 69.4 percent, and 72.2 percent of sentences fell within the Guidelines range, respectively. United States Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* D-10 (2006), online at http://www.ussc.gov/booker_report/Booker_Report.pdf (visited July 7, 2007).

78 See *Booker*, 543 US at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

Though judges were still required to provide "the specific reason for imposition"[79] of a non-Guidelines sentence, the procedural route to a non-Guidelines sentence was indistinguishable from the route to a sentence within the applicable range. Subsequently, some circuits have developed multistage processes for calculating sentences to reflect the § 3553(a) factors.[80] Sentencing courts in these circuits begin with the Guidelines range, determine if under the mandatory Guidelines regime a departure would have been appropriate, and then determine if a variance should be applied.

II. CIRCUIT SPLIT

Post-*Booker*, circuits have divided on the question of whether a judge must still provide notice before imposing a sentence outside the applicable Guidelines range. In addressing the issue, most courts have distinguished between departures and variances.[81]

The Second, Fourth, Sixth, and Tenth Circuits require notice prior to variance or departure.[82] The Third and Eleventh Circuits do not require notice prior to variance but do require notice prior to departure.[83] The Eighth Circuit does not require notice prior to variance and has not decided whether notice is still required prior to departure.[84] The Seventh Circuit does not require notice prior to variance and no

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79 18 USC § 3553(c)(2).

80 See, for example, *United States v Claiborne*, 439 F3d 479, 480 (8th Cir 2006) ("In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. The court may then impose a sentence outside the range in order to tailor the sentence in light of the other statutory concerns in § 3553(a)."") (internal quotation marks and citations omitted); *United States v Hughes*, 401 F3d 540, 546 (4th Cir 2005); *United States v Crosby*, 397 F3d 103, 113 (2d Cir 2005).

81 But see *United States v Evans-Martinez*, 448 F3d 1163, 1167 (9th Cir 2006) ("We hold Rule 32(h) requires that a district court provide notice of its intent to sentence outside the range suggested by the Guidelines post-*Booker*, as it did pre-*Booker*.").

82 See *United States v Atencio*, 476 F3d 1099, 1103–04 (10th Cir 2007) (holding that because the reasoning of *Burns* remains valid after *Booker*, Rule 32 requires notice prior to both sua sponte variances and departures); *United States v Cousins*, 469 F3d 572, 580 (6th Cir 2006) (holding that FRCrP 32(h) applies equally to departures and variances); *United States v Anati*, 457 F3d 233, 237 (2d Cir 2006) (reasoning that variances and departures are similar with respect to the concerns evident in *Burns*, and thus notice should be required before a sua sponte imposition of either); *United States v Davenport*, 445 F3d 366, 371 (4th Cir 2006) ("[N]otice of an intent to depart or vary from the guidelines remains a critical part of sentencing post-*Booker.*").

83 See *United States v Irizarry*, 458 F3d 1208, 1212 (11th Cir 2006) (distinguishing variances from departures with respect to the applicability of Rule 32(h) and holding that a sua sponte variance does not require notice under Rule 32(h)); *United States v Vampire Nation*, 451 F3d 189, 197–98 (3d Cir 2006) (holding that Rule 32(h) requires notice prior to a sua sponte departure but not prior to a sua sponte variance; accordingly, sentencing courts should be careful to explicitly distinguish the two concepts).

84 See *United States v Long Soldier*, 431 F3d 1120, 1122 (8th Cir 2005).

longer recognizes departures as a legally meaningful concept.[85] The Ninth Circuit does not distinguish between variances and departures, requiring notice prior to sua sponte imposition of non-Guidelines sentences.[86]

This Part examines how courts analyze the notice requirement prior to sua sponte departures and variances, respectively.

A. Notice Prior to Departure

No circuit has reassessed whether the departure concept has survived *Booker*'s excision of § 3553(b)(1). The Seventh Circuit has declared departures obsolete following *Booker*, but based its reasoning on the excision of § 3742(e) rather than § 3553(b)(1). Outside the Seventh Circuit, courts continue to employ departures, asking if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines"[87] before imposing sentences. Courts in these circuits continue to follow Rule 32(h),[88] which requires them to provide "parties [with] reasonable notice [when] contemplating . . . a departure."[89]

The Seventh Circuit rejected the departure concept as obsolete in *United States v Walker*.[90] Part III.A will explain why the *Walker* court reached the correct conclusion. Its conclusion, however, was unsupported save for citations to cases considering a peripheral issue. In *United States v Johnson*,[91] the Seventh Circuit considered the implications of *Booker*'s excision of 18 USC § 3742(e), which required de novo review of departures, and its replacement with review for reasonableness.[92] Johnson challenged three upward departures and based his challenge in part on pre-*Booker* holdings that specified a procedure for engaging in de novo review of departures.[93] In reviewing Johnson's sentence, the appellate court explained: "[W]hat is at stake is the reasonableness of the sentences, not the correctness of 'departures' as measured against pre-*Booker* decisions."[94] The issue *Johnson*

85 See *United States v Walker*, 447 F3d 999, 1006–07 (7th Cir 2006).

86 See *Evans-Martinez*, 448 F3d at 1167.

87 18 USC § 3553(b)(1).

88 See, for example, *Long Soldier*, 431 F3d at 1122 ("Rule 32(h) provides that under certain circumstances the district court must give notice to the parties that it is contemplating a departure from the guidelines range.").

89 FRCrP 32(h).

90 447 F3d 999 (7th Cir 2006).

91 427 F3d 423 (7th Cir 2005).

92 See *Booker*, 543 US at 261.

93 See *Johnson*, 427 F3d at 426–27.

94 Id at 426.

considered and disposed of was whether the Seventh Circuit's doctrines governing de novo review of departures survived *Booker*'s excision of § 3742(e). The court concluded they had not without facing the broader question of whether departures themselves survived *Booker*. The other case the *Walker* court cited offhand for the proposition that departures were obsolete following *Booker* was *United States v Castro-Juarez*,[95] which faced the same question as *Johnson*.[96]

The Seventh Circuit faced the question whether notice was still required prior to sua sponte departures in *Walker*. In *Walker*, the court declared that this question had been effectively answered by *Johnson* and *Castro-Juarez*, which it cited for the broad proposition that departures were "obsolete."[97] Neither case, however, stood for that proposition. Each only held that the excision of § 3742(e) obviated the Seventh Circuit's doctrines for implementing de novo review.

B. Notice Prior to Variance

The Second and Fourth Circuits require notice prior to sua sponte variance,[98] whereas the Third, Seventh, Eighth and Eleventh Circuits do not.[99]

In *United States v Long Soldier*,[100] the Eighth Circuit disposed of this issue narrowly by simply observing that Rule 32(h) does not re-

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95 425 F3d 430 (7th Cir 2005).

96 In *Castro-Juarez*, the Seventh Circuit abandoned the *Cross* test, which it had developed prior to *Booker* to analyze upwards departures. *Castro-Juarez*, 425 F3d at 434 ("Prior to *Booker* we analyzed upward departures … using a standard that required (1) 'adequate grounds to support the departure,' (2) evidence that 'the facts cited to support the departure actually exist,' and (3) a sufficient link between the degree of departure and 'the structure of the guidelines.'"), quoting *United States v Cross*, 289 F3d 476, 478 (7th Cir 2002). The court in *Castro-Juarez* described itself as ruling on issues of review of non-Guidelines sentences following *Booker*, not departures generally. See *Castro-Juarez*, 425 F3d at 434.

97 See *Walker*, 447 F3d at 1006, quoting *Johnson*, 427 F3d at 426 (alterations added by *Walker* court):

> Johnson's framing of the issue as one about 'departures' has been rendered obsolete by our recent decisions applying *Booker*. . . . After *Booker*, what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory.

The *Walker* court also cited *United States v Laufle*, 433 F3d 981, 986–87 (7th Cir 2006), which had described departures as "beside the point." *Laufle* narrowly concerned itself with the question of proper review of non-Guidelines sentences. Like *Johnson*, *Laufle* was based on the excision of § 3742(e). See *Laufle*, 433 F3d at 984.

98 See *Anati*, 457 F3d at 237; *Davenport*, 445 F3d at 371.

99 See *Irizarry*, 458 F3d at 1212; *Vampire Nation*, 451 F3d at 195; *Walker*, 447 F3d at 1006–07; *Long Soldier*, 431 F3d at 1122.

100 431 F3d 1120 (8th Cir 2005).

quire notice prior to a variance.[101] Unlike the Court deciding *Burns*, the *Long Soldier* court did not consider whether Rule 32(i)(1)(C) should be read to support a notice requirement.[102]

Other circuits have recognized the statutory gap and issued broader holdings. These courts have considered the "unfair surprise" and "adversarial testing" concerns that motivated *Burns* but have come to differing conclusions.

The Seventh Circuit returned to the *Burns*'s analysis to resolve whether notice would be required after *Booker*.[103] The *Walker* court erred by omission, assuming that the essential concern of *Burns* was "the element of unfair surprise" rather than the express language of Rule 32(i)(1)(C) that reserved an opportunity to comment.[104] Pursuant to this selective reading, "the element of unfair surprise that underlay *Burns* and led to the creation of Rule 32(h) [was] no longer present."[105] The element was absent because the post-*Booker* defendant "ha[s] full knowledge of all the facts on which the district court relie[s] for its § 3553(a) analysis."[106] In *United States v Vampire Nation*[107] and *United States v Irizarry*,[108] respectively, the Third and Eleventh Circuits affirmed the Seventh's reasoning.[109]

The Fourth Circuit more thoroughly adopted the analysis from *Burns*, recognizing that the decision was written against a statutory background that already mandated the disclosure of facts used at sentencing.[110] The *Burns* decision did not concern notice of facts but notice of how legal criteria would be applied to those facts to determine

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101 See id at 1122 ("[N]otice pursuant to Rule 32(h) is not required when the adjustment to the sentence is effected by a variance, rather than by a departure.").

102 See also *Irizarry*, 458 F3d at 1212 (observing that Rule 32(h) requires notice prior to departures but not variances).

103 See *Walker*, 447 F3d at 1006 ("Now that *Booker* has rendered the Guidelines advisory, the concerns that animated the Court's decision in *Burns* no longer apply.").

104 The *Walker* court described the *Burns* holding as based on "an earlier version of Rule 32," neglecting the fact that contemporary Rule 32 features identical language to that construed in *Burns*, albeit in provision 32(i)(1)(C) rather that 32(a)(1). See *Walker*, 447 F3d at 1006. See also FRCrP 32(i)(1).

105 *Walker*, 447 F3d at 1007.

106 Id.

107 451 F3d 189 (3d Cir 2006).

108 458 F3d 1208 (11th Cir 2006).

109 See id at 1212 ("After *Booker*, parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between the statutory minimum and maximum."); *Vampire Nation*, 451 F3d at 196 ("[The] element of 'unfair surprise' that *Burns* sought to eliminate is not present."), quoting *Walker*, 447 F3d at 1007.

110 See *Davenport*, 445 F3d at 371 ("There is 'essentially no limit on the number of potential factors that may warrant a departure' or a variance, and neither the defendant nor the Government 'is in a position to guess when or on what grounds a district court may depart' or vary from the guidelines."), quoting *Burns*, 501 US at 136–37.

a sentence.[111] The Fourth Circuit observed that post-*Booker*, parties were no better able to predict the imposition of a non-Guidelines sentence than pre-*Booker*.[112]

The Second Circuit went one step further than the Fourth in applying *Burns* to the question of notice prior to sua sponte variances in *United States v Anati*.[113] After observing that Rule 32(i)(1)(C) contains language identical to that interpreted by *Burns* to require notice prior to sua sponte departures, *Anati* construed the language of the Rule to extend to courts' sua sponte decisions to impose a variance.[114] The court supported its construction with the purpose of Rule 32 stated in *Burns*: "[F]acilitation . . . of adversarial testing of factual and legal considerations relevant to sentencing."[115]

TABLE 1: NOTICE REQUIREMENTS FOR DEPARTURES AND VARIANCES BY CIRCUIT

	Notice for Departures	No Notice for Departures
Notice for Variances	2d, 4th, 6th, 9th,[116] 10th	
No Notice for Variances	3d, 8th,[117] 11th	7th[118]

III. RESOLVING THE CIRCUIT SPLIT

Rule 32(h) and *Burns* were designed for mandatory sentencing under the Guidelines; accordingly, they are not simply interoperable with post-*Booker* sentencing. The following discussion explains *Booker*'s effects on these authorities. First, it identifies the basis for the departure concept and explains why the concept is void after *Booker*. Second, it explains why a narrow reading of *Burns* would require judges in multistage jurisdictions to provide notice prior to con-

111 See 501 US at 138–39 ("The [required] notice must specifically identify the ground on which the district court is contemplating an upward departure.").

112 See *Davenport*, 445 F3d at 371 ("The need for notice is as clear now as before *Booker*.").

113 457 F3d 233 (2d Cir 2006).

114 See id at 236.

115 See id at 237. See also *United States v Evans-Martinez*, 448 F3d 1163, 1167 (9th Cir 2006) (explaining that parties must receive notice of a court's intent to impose a non-Guidelines sentence "to ensure that issues with the potential to impact sentencing are fully aired.").

116 The Ninth Circuit has not distinguished between variances and departures, requiring notice before both. See *Evans-Martinez*, 448 F3d at 1167.

117 The Eighth Circuit has not decided if it requires notice prior to departure. See, for example, *Long Soldier*, 431 F3d at 1122.

118 The Seventh Circuit considers departures obsolete following *Booker*. See *Walker*, 447 F3d at 1006–07.

cluding that a Guidelines sentence would be inadequate. Third, it offers a broader reading of *Burns* focusing on its stated goals of adversarial testing and avoiding due process violations. It shows how a notice requirement in all jurisdictions would further those goals.[119]

A. *Booker* Obviated the Departure Concept

Booker annihilated § 3553(b)(1) and invalidated statutory cross references to the provision.[120] The legal force of pre-*Booker* rules and doctrines applying the departure concept as established in that provision were annihilated with it. Nevertheless, the majority of circuits have persisted in applying these pre-*Booker* authorities as controlling departures. The Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits hold that Rule 32(h) operates unchanged following *Booker* so a court must still "give parties reasonable notice that it is contemplating . . . a departure."[121] Circuits applying Rule 32(h) post-*Booker* have not specified what a departure is in the absence of § 3553(b)(1).

1. The Guidelines do not support a departure concept.

The Guidelines do not offer an independent statutory basis for departures in lieu of § 3553(b)(1). The Guidelines warrant departures when either the calculated severity of the offense or the criminal history level of the defendant do not reflect the actual severity of the offense committed or the actual history of the offender.[122]

USSG § 5K2.0 defines when circumstances of the offense warrant a departure from the applicable range. The section cross-references the excised provision: "The sentencing court may depart from the applicable guideline range if . . . the court finds, pursuant to 18 U.S.C.

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119 Recently, in *Claiborne v United States*, 127 S Ct 551 (2007), the Court granted certiorari to decide whether it is consistent with *Booker* "to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances." However the Court resolves this issue, some circuits may continue to employ a multistage sentencing procedure and others a single multifactor balancing scheme. First, the decision will likely not resolve how courts treat insubstantial variances. Second, even if a court had to justify its substantial variance by noting extraordinary circumstances, such justification could follow either a multistage determination or a multifactor balancing.

120 See 543 US at 259.

121 See *United States v Evans-Martinez*, 448 F3d 1163, 1167 (9th Cir 2006); *United States v Dozier*, 444 F3d 1215, 1217 (10th Cir 2006).

122 Pursuant to 18 USC § 3553(e), a sentence reduction may be imposed to "to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Though such reductions have also been referred to as "departures," they have a separate statutory basis and affect sentencing only when the offender has substantially cooperated with law enforcement. See generally USSG § 5K1.1 (discussing sentence adjustments for substantial assistance to authorities).

§ 3553(b)(1), that there exists an aggravating or mitigating circumstance."[123] *Booker* explicitly invalidated all statutory authority cross-referencing § 3553(b)(1);[124] thus USSG § 5K2.0 offers no statutory basis for a court's departure. Contrary to the Supreme Court's command, courts continue to rely on § 5K2.0.[125]

In USSG § 4A1.3, the Guidelines provide for departures based on inadequacy of the defendant's criminal history category. Commentary to § 4A1.3 incorporates the definition of departures as found in § 1B1.1.[126] USSG § 1B1.1, in turn, defines departure to mean "assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range."[127] Rather than sentencing outside the Guidelines range, this provision allows a court to select a Guidelines range by ratcheting the defendant's criminal history up or down. As such, this section does not provide a basis for imposing a sentence outside the Guidelines range. Moreover, all but the Third Circuit have held that the Commission's authority for § 4A1.3 derives from § 3553(b)(1).[128] Now that § 3553(b)(1) is excised, USSG § 4A1.3 cannot stand on its own in most circuits.

Neither § 3553(b)(1), the Sentencing Guidelines, nor any other statutory authority offers judges a basis for departing from the applicable sentencing range.

B. Notice Should Be Provided prior to Sua Sponte Variances

Burns held that "whether a sua sponte departure from the Guidelines would be legally and factually warranted is a 'matte[r] relating to the appropriate sentence.'"[129] The Court buttressed its construction of Rule 32(i)(1)(C) by arguing that not requiring notice would be incon-

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123 USSG § 5K2.0(a)(1)(A).

124 See 543 US at 259.

125 See, for example, *United States v Sitting Bear*, 436 F3d 929, 934 (8th Cir 2006) ("[T]he district court, where appropriate, should consider the departure provisions contained in Chapter 5, Part K and/or § 4A1.3 *of the Guidelines*, as those sentencing provisions have not been excised by *Booker*.").

126 USSG § 4A1.3 Commentary ("For purposes of this policy statement, the terms 'depart,' 'departure,' 'downward departure,' and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1.").

127 USSG § 1B1.1 Commentary.

128 See, for example, *United States v Deutsch*, 987 F2d 878, 886 (2d Cir 1993) (focusing upon the imprimatur of § 3553(b) in considering the application of § 4A1.3); *United States v Luscier*, 983 F2d 1507, 1511 (9th Cir 1993) (same). But see *United States v Shoupe*, 988 F2d 440 (3d Cir 1993) (arguing that the Commission's general authority to consider a defendant's criminal history in formulating the Guidelines under 28 USC § 994(a), (d)(10) provides the statutory basis for USSG § 4A1.3 departures).

129 501 US at 135 (alteration in original).

sistent with the congressional intent "of promoting focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences" and would prompt due process concerns.[130] *Burns* was decided over a decade before *Booker* and continues to be good law. Whether notice should be provided prior to sua sponte variances requires answering two questions. First, do sua sponte variances raise a "matter relating to the appropriate sentence"? Second, are sua sponte variances less inconsistent with the goals of focused, adversarial resolution of legal and factual issues at sentencing, or do they pose milder threats to due process? The answer to the first question, discussed in Part III.B.2, depends on a feature of sentencing procedure that varies across circuits. In circuits where trial courts are required to first calculate the Guidelines range and then determine if a sentence within that range inadequately reflects the circumstances of the crime, the sua sponte variance is predicated on a conclusion indistinguishable from that which *Burns* held was a "matter[] relating to the appropriate sentence."[131] In these multistage circuits, Rule 32(i)(1)(C) requires trial courts to provide parties with notice and an opportunity to comment prior to sua sponte variances.

The answer to the second question is less certain but applies across all circuits. As will be discussed in Part III.B.3, Rule 32 did not explicitly require notice prior to sua sponte variances not because Congress did not intend such a requirement but because the Rule was written well before *Booker* made variances possible. No reason is apparent as to why the decision to vary should be insulated from the adversarial process or why due process concerns posed by variances are any less serious than those posed by departures.

Before turning to these two questions, the next section explores the ambiguous scope of "matters relating to the appropriate sentence."

1. What is a Rule 32(i)(1)(C) matter?

Unlike a sua sponte departure, which requires a legal conclusion that the Guidelines range inadequately accounts for an aggravating or mitigating circumstance, a sua sponte variance is not necessarily predicated on a determination of the Guideline range's inadequacy. *Booker* required judges to "take account of the Guidelines together with other sentencing goals,"[132] but did not establish a procedure for

130 Id at 137–38.

131 Id at 135.

132 *Booker*, 543 US at 259.

weighing these goals.[133] Absent authority to the contrary, a post-*Booker* sentencing court considers the § 3553(a) factors in parallel. It still calculates the Guidelines range, in keeping with § 3553(a)(4), but the range does not serve as a starting place for sentence selection and no intermediate determination is made before a non-Guidelines sentence is imposed. Because there is no procedural difference between imposition of a Guidelines and a non-Guidelines sentence in such jurisdictions, no identifiable "matter relating to the appropriate sentence" arises prior to the imposition of a non-Guidelines sentence. Without such a matter, there is no purchase for Rule 32(i)(1)(C).[134]

Before turning to the implications of the presence or absence of "matters relating to the appropriate sentence," what qualifies as a "matter" should be clarified. *Black's Law Dictionary* offers the following definition: "1. A subject under consideration, esp. involving a dispute or litigation .... 2. Something that is to be tried or proved; an allegation forming the basis of a claim or defense."[135] Either of these definitions, if applied literally, suggests that "relating to the appropriate standard" imposes a tough relevancy standard on matters. Judges have resolved disputes as to the facts of the offense ever since the Guidelines were implemented.[136] These facts were "to be tried and proved" and "under consideration" yet courts have not provided parties an opportunity to comment on their factual findings. Furthermore, courts have not provided parties an opportunity to comment on their reasons "for imposing a sentence at a particular point within the [Guidelines] range," though such reasons had to be included in the order of judgment and commitment.[137] Clearly, not all determinations relevant to the appropriate sentence are related enough for the purpose of FRCrP 32.

Burns established that in "the extraordinary case in which the district court, on its own initiative and contrary to the expectations of both the defendant and the Government, decides that the factual and legal predicates for a departure are satisfied," Rule 32(i)(1)(C) would apply.[138] The holding did not explain why less extraordinary decisions were not subject to the same requirement and no subsequent author-

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133 See id at 304–05 (Scalia dissenting) (noting that remaining authorities provide "no order of priority among all those factors" listed in § 3553(a)). See also *United States v Sisco*, 2006 US App LEXIS 10109, *6 (7th Cir) (explaining that "district court[s are] not required to weigh one § 3553(a) factor more heavily than the others").

134 One may argue that the sentence itself is a matter relating to the sentence, but then one would have to answer why notice precedes only non-Guidelines sentences.

135 *Black's Law Dictionary* 999 (West 8th ed 2004).

136 FRCrP 32(i)(3)(B).

137 18 USC § 3553(c).

138 501 US at 135.

ity has explained the limitation on the literal reading of Rule 32(i)(1)(C). Having acknowledged that parties' right to comment has been implicitly limited by judicial interpretations of Rule 32(i)(1)(C), the question of how far that right extends after *Booker* remains. The subsequent section compares the legal conclusions predicate to a post-*Booker* sua sponte variance to the legal conclusions predicate to a pre-*Booker* sua sponte departure. It argues that the two are largely identical. Accordingly, courts should find, as the *Burns* court found, that sua sponte variances constitute "matters relating to the appropriate sentence" and must be preceded with notice and an opportunity to comment.

2. The decision to vary in multistage jurisdictions is a related matter.

It is not necessary to discover a limiting principle that defines the scope of related matters under Rule 32(i)(1)(C) to conclude that post-*Booker* variances in multistage jurisdictions must be preceded with notice and an opportunity to comment. As explained above, multistage circuits require an intermediate determination whether a variance would be appropriate before a non-Guidelines sentence is imposed. On a substantive level, the circumstances in which a variance would be appropriate in these circuits are largely identical to those in which a departure would have been appropriate prior to *Booker*.[139] It is difficult to imagine an aggravating or mitigating circumstance that does not relate to one of the generic penal goals listed in § 3553(a)(2): retribution, deterrence, incapacitation, and rehabilitation. The Isreal Edwards case discussed in Part I demonstrates that when the Guidelines range does not adequately account for a circumstance of the offense, a judge pursuing the penal goals of § 3553(a)(2) after *Booker* could vary just as surely as she could depart pre-*Booker*.

Those circuits that have adopted a multistage sentencing procedure requiring a court to first calculate the applicable Guidelines range and then to determine if "other relevant factors set forth in the guidelines and those factors set forth in § 3553(a)"[140] warrant imposition of a non-Guidelines sentence have effectively reinstated a deter-

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139 See 18 USC § 3553(a)(2)(A)–(D) (enumerating retribution, deterrence, and incapacitation as goals a court "shall" consider in imposing a sentence). A second argument for requiring notice in these jurisdictions rests on a limiting principle to Rule 32(i)(1)(C) rather than the substantive similarities between criteria to depart and vary. This limiting principle is based on the balance between judicial economy and parties' interests in accurate sentencing and will be discussed more in the subsequent section.

140 *United States v Hughes*, 401 F3d 540, 546 (4th Cir 2005). See also *United States v Atencio*, 2007 US App LEXIS 974, *12 (10th Cir); *United States v Cousins*, 469 F3d 572, 580 (6th Cir 2006); *Anati*, 457 F3d at 237; *Sitting Bear*, 436 F3d at 934 (describing the three-stage sentencing procedure practiced in the Eighth Circuit).

mination that *Burns* treated as a matter subject to the notice requirement of Rule 32(i)(1)(C).[141] Accordingly, notice must be provided prior to sua sponte variances in these circuits.

In jurisdictions where sentencing courts are not required to make a separate determination as to the adequacy of the Guidelines range before imposing a non-Guidelines sentence, no identifiable "matter[] relating to an appropriate sentence" arises prior to imposition of the variance.[142] Pre-*Booker*, judges were not required to provide notice prior to imposing sentences within the Guidelines range. Now that the Guidelines are advisory and the range available to judges is the full statutory range, it is not obvious why a sentence outside the Guidelines range would be subject to Rule 32(i)(1)(C)'s requirement but a sentence within the Guidelines range would not be.

The vague scope of "matters" subject to Rule 32(i)(1)(C) and the variety of sentencing procedures adopted post-*Booker* help to explain why circuits split on this issue. Those circuits that require an intermediate determination that the Guidelines range is inadequate before a sua sponte variance is imposed must give parties notice pursuant to Rule 32(i)(1)(C) as it was construed in *Burns*. It is less certain if the notice requirement must be adopted in other jurisdictions. The subsequent section proposes that a broad reading of *Burns* makes the notice requirement appropriate across all jurisdictions.

3. *Burns*'s concerns with adversarial sentencing and due process justify notice.

Because the logic of the *Burns* opinion assumed that a "matter" would arise prior to sua sponte sentencing outside the Guidelines, the legal reasoning of the opinion is not directly adaptable to the post-*Booker* environment. Nevertheless, the opinion offers both a statement of the competing values at stake in selecting a notice requirement and an example of an acceptable accommodation.

Burns identified two goals: implementing Rule 32's adversarial system and avoiding due process violations.[143] These goals are inextricably linked. *Mullane v Central Hanover Bank & Trust Co*[144] interpreted the Due Process Clause to require that parties with a life, liberty, or property interest at stake be granted notice and an opportu-

141 See *Anati*, 457 F3d at 236–38 (discussing the similarity between pre- and post-*Booker* sentencing).

142 See, for example, *Walker*, 447 F3d at 1007 (explaining that a sentencing court only needs to consider the § 3553(a) factors before imposing a non-Guidelines sentence).

143 501 US at 134.

144 339 US 306 (1950).

nity to participate in the trial.[145] Reciprocally, the adversarial system functions as an efficient compromise between due process concerns for parties' interest in accurate sentencing and judicial economy.[146]

It has already been observed that *Burns* did not generally require notice prior to sentencing. Such a requirement was limited to sua sponte departures. If the court was concerned with providing parties an opportunity to comment on matters relating to the appropriate sentence, why limit the requirement to non-Guidelines sentences? The opinion discusses at least two bases for the limitation: due process concerns and the goal of preserving adversarial resolution of legal and factual issues at sentencing. The subsequent two subsections address these in turn.

a) Distinguishing non-Guidelines sentences avoids due process concerns. Due process concerns are proportional to the private interest implicated in a given decision. The Guidelines range is narrow relative to the statutory range, so an inaccuracy within the Guidelines range cannot be that inaccurate, relatively speaking. As an example, consider Booker's case. Booker was convicted of possessing at least fifty grams of cocaine with intent to distribute. The base offense level for the offense spans from 210 to 262 months.[147] The statutory range for the offense, however, is ten years (120 months) to life.[148] A defendant whose "proper" sentence was at the low end of the Guidelines range, but who was sentenced at the high end, at the maximum spends an additional 52 months in prison. A defendant who was improperly sentenced outside the Guidelines may spend the rest of his life in prison.

Due process analysis must balance the marginal benefits to the litigants from the additional safeguard against the government's interests, which include judicial economy.[149] A notice requirement would

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145 Id at 313–14 (holding that "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections" is "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality").

146 See Richard A. Posner, *Economic Analysis of Law* 529–30 (Aspen 6th ed 2003) (explaining how the adversarial process harnesses parties' self-interest to reduce taxpayers' expenditures on justice). But see generally William Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (NYU 1999) (arguing that the adversarial system breeds expensive and inaccurate procedural rules that could be avoided under the inquisitorial alternative).

147 *Booker*, 543 US at 227.

148 Id.

149 See *Burns*, 501 US at 147 (O'Connor dissenting) (underscoring the importance of governmental interest in the due process inquiry), quoting *Mathews v Eldridge,* 424 US 319, 335 (1976). *Mathews* explains that the three part due process inquiry consists of:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Govern-

increase the burden on trial judges by requiring them to respond to what would doubtlessly become conventional motions to reassess the sentence.[150] Such motions, however, would be only as frequent as sua sponte non-Guidelines sentences.[151] Having access to the pre-*Booker* experience of trial courts, we know that this limited burden is not unsustainable. More essential than the debatable cost of the notice requirement is that this cost is approximately constant whether or not the sentence falls within the Guidelines range. With the cost to trial courts staying constant, but the cost to parties rising the further a defendant is sentenced from the Guidelines range, a point is reached where providing notice to parties becomes worthwhile. It may be that the point is not exactly at the border of the Guidelines range, but that border offers the only landmark in the otherwise featureless statutory range for striking the balance between parties' interests in accuracy and judicial resources.

b) Distinguishing non-Guidelines sentences preserves adversarial resolution of issues. A notice requirement would also patch a weakness in the adversarial process exposed at sentencing. Because most sentences still fall within Guidelines ranges and those Guidelines ranges were "fashioned taking the other § 3553(a) factors into account and are the product of years of careful study," parties may develop an expectation, founded on experience and law, that the sentence will not stray outside the applicable range.[152] Nevertheless, there are manifold ways to apply well-known law to well-known facts. Judges may have idiosyncratic responses to certain features of a crime and occasionally,

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ment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 US at 335.

150 The dissent in *Burns* argued that the government's interest in avoiding such motions was not "an insignificant one." 501 US at 149 (O'Connor dissenting). Quite plausibly, the dissent explained that the time spent on "advance review will not simply be recovered by subtracting it from the length of the subsequent sentencing hearing." Id. What the dissent did not consider was that trial judges do eventually have to review the facts, and though the time spent in advance review would not be subtracted from the hearing itself, it would offset the time inevitably spent before the hearing.

151 Judges imposed non-Guidelines sentences sua sponte in 12.8 percent of cases in 2005. In 2003, sua sponte departures were imposed in 7.2 percent of cases and in 2001 in 18.3 percent of cases. Families Against Mandatory Minimums, *Booker Revisited*, 16 Fammgram 1, 1 (Spring 2006), online at http://www.famm.org/Repository/Files/FGspring06final%5B1%5D.pdf (visited July 7, 2007).

152 *United States v Claiborne*, 439 F3d 479, 481 (8th Cir 2006). Seven circuits have established that Guidelines sentences are presumptively reasonable on review. See *United States v Cage*, 458 F3d 537, 542–43 (6th Cir 2006); *United States v Dorcely*, 454 F3d 366, 376 (DC Cir 2006); *United States v Terrell*, 445 F3d 1261, 1264 (10th Cir 2006); *United States v Johnson*, 445 F3d 339, 341 (4th Cir 2006); *Claiborne*, 439 F3d at 481; *United States v Alonzo*, 435 F3d 551, 554 (5th Cir 2006); *United States v Mykytiuk*, 415 F3d 606, 608 (7th Cir 2005).

spurred by those idiosyncrasies, impose surprising sentences backed by surprising reasoning.[153] Not only are some lines of reasoning difficult to foresee, but a party may be reluctant to anticipatorily rebut such lines of reasoning because their rebuttal requires their proposition, and the risk of adversely affecting the sentence by introducing an unfavorable argument could outweigh the benefits of averting an unlikely variance.[154] These two features—the unforeseeability of sua sponte variances and the potential harm from their preemptive rebuttal—suggest that to achieve "focused, adversarial development of the factual and legal issues,"[155] notice must be provided.[156]

Because sua sponte impositions of non-Guidelines sentences continue to be rare, such impositions serve as convenient proxies for when judicial reasoning was unforeseeable or costly to preempt. In this context, notice provides a crucial guarantee that the adversarial process is thoroughly applied.

Burns held that notice was required prior to sua sponte departures so as to implement the adversarial scheme motivating Rule 32, in keeping with established canons of construction that avoid interpreting statutory silence to allow "deprivations of liberty or property [without] . . . both notice and a meaningful opportunity to be heard."[157] Rule 32 was written before *Booker* and thus is necessarily silent on the treatment of variances. Because the sua sponte imposition of a non-Guidelines sentences continue to raise the same due process and adversarial concerns that it did when *Burns* was decided, this statutory silence should be construed in favor of notice.[158]

IV. FACT BARGAINING POST-*BOOKER*

Part III explained why notice should be provided to parties prior to sua sponte variances. This Part explores how notice would affect

153 See, for example, *Anati*, 457 F3d at 235. In *Anati*, the trial court had based its sentence partly on its opinion that "the deleterious impact of heroin in our communities . . . is even more serious than cocaine." Id. This opinion contradicted the judgment of the Sentencing Commission as reflected in the relatively longer sentencing ranges for cocaine offenses. Id at 238. The appeals court observed that factual findings such as these would be especially difficult for parties to foresee. Id at 237.

154 See *Burns*, 501 US at 137.

155 Id at 134.

156 There is no reason why a sentence just within the Guidelines range is much easier to predict than one just outside the Guidelines range. Nor is there a reason to think that parties can distinguish between grounds that may lead a judge to sentence just inside the Guidelines range and grounds that lead a judge to issue a sentence just outside the Guidelines. As a matter of degree, however, parties may have more trouble foreseeing applications of law to fact that lead to more extreme sentences and may be more reluctant to anticipatorily rebut such applications.

157 *Burns*, 501 US at 137–38.

158 See *Atencio*, 2007 US App LEXIS 974 at *14–15 (10th Cir 2007).

plea bargaining. Without an opportunity to check erroneous sua sponte variances, parties otherwise acting in good faith may be tempted to fact bargain so as to assure that the trial court will lack a factual basis on which to overturn the parties' bargain. A notice requirement avoids legitimizing fact bargaining as the only alternative to erroneous sentences.

Statistics are not available on the frequency with which trial courts overturn plea bargains and impose non-Guidelines sentences sua sponte following *Booker*. Because well over half the cases composing the circuit split addressed in this Comment arose in just such circumstances, the answer cannot be "never."[159] In response to such incidents, the Department of Justice has issued a memo to federal prosecutors announcing its preference for the notice requirement.[160] Subsequently, prosecutors have joined defendants on appeal in arguing that sua sponte upward variances deserve notice.[161] This unusual pairing may be explained by the effects of sua sponte variances on bargains.

On paper, prosecutors may strike three types of bargains with defendants. First, they may drop some charges in exchange for a guilty plea to another offense.[162] Second, they may agree to recommend a particular sentence.[163] Third, they may agree on a specific sentence.[164]

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159 See, for example, *United States v Mejia-Huerta*, 2007 US App LEXIS 4586, *3–4, *5–7 (5th Cir 2007) (observing that the trial court's sua sponte variances overturned codefendants' plea bargains); *United States v Cousins*, 469 F3d 572, 574 n 2 (6th Cir 2006) (same); *United States v Evans-Martinez*, 448 F3d 1163, 1165–66 (9th Cir 2006); *United States v Cousins*, 469 F3d 572, 574 n 2 (6th Cir 2006).

160 See *Walker*, 447 F3d at 1007 n 7.

161 See, for example, *Mejia-Huerta*, 2007 US App LEXIS 4586 at *14 (noting that both the government and the defendants agreed that *Burns*, Rule 32(h), the adversarial process, and due process concerns all required the trial court to give notice before imposing a sua sponte non-guidelines sentence); *Vampire Nation*, 451 F3d at 195 (observing that the government switched positions and agreed with the defendant that notice should be provided irrespective of the characterization of the sentence as a variance or a departure); *United States v Jones*, 2006 US App. LEXIS 10512, *5 (1st Cir) (same); *Walker*, 447 F3d at 1007 n 7 (noting that a DOJ memo to prosecutors supported a notice requirement); *United States v Dozier*, 444 F3d 1215, 1217 (10th Cir 2006) ("The Government concedes that the District Court erred in failing to give Mr. Dozier notice of its intention to depart upward and it does not contest that remand is in order.").

162 See FRCrP 11(c)(1)(A) (providing that the bargain may require the prosecutor to "not bring, or . . . move to dismiss, other charges").

163 FRCrP 11(c)(1)(B). Instead of agreeing to recommend a particular sentence, the prosecutor may agree to recommend a sentencing range or emphasize a particular sentencing factor or Guidelines provision or policy statement. Additionally, the agreement can simply commit the prosecutor to abstaining from the sentencing process.

164 FRCrP 11(c)(1)(C). Again, the parties may agree to a sentencing range or the emphasis of a particular sentencing factor or Guidelines provision or policy statement.

Courts review each bargain struck[165] and may reject a bargain if it does not reflect the facts of the case.[166]

In practice, bargaining may determine not just the charge and sentence but also the narrative of the offense that the judge will use to assess their suitability.[167] Parties may manage information contained in the presentence report.[168] Parties may also stipulate to facts.[169] Stipulation may discourage a probation officer from further investigation or even if further investigation is pursued and contrary facts are discovered and included in the presentence report, the probation officer may not be able to carry the burden of proof.[170] These techniques enable collusive parties to avoid judicial oversight of plea bargaining.[171]

The problem with plea bargaining is that it produces sentencing disparity. First, defendants who plea bargain usually receive lower sentences than similar defendants who are found guilty through trial.[172]

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165 See FRCrP 11(b)(3), (c)(3) (requiring courts to review the factual basis for the plea).

166 FRCrP 11(c)(5) (allowing courts to reject a plea).

167 See *Booker*, 543 US at 255 (noting that the "system has not worked perfectly; judges have often simply accepted an agreed-upon account of the conduct at issue"); id at 290 (Stevens dissenting) (noting that fact bargaining is "quite common under the current system"). See also John Ashcroft, Memorandum, *Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing*, online at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (visited July 7, 2007) (stating official DOJ policy not to engage in fact bargaining).

168 See *United States v Green*, 346 F Supp 2d 259, 269 (D Mass 2004) (noting that "the phenomenon known as 'fact bargaining' has come to flourish as never before in the federal courts" and thus the Department of Justice "has the power—and the incentive—to ratchet punishment up or down solely at its discretion"); Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 Stan L Rev 293, 295 (2005) ("[B]ecause judicial oversight of negotiated sentences depends upon access to independent offense and offender information in the presentence report, parties can handicap the judge's ability to detect how their recommended disposition deviates from the Guidelines by managing the information that is revealed during the presentence investigation."); Felicia Sarner, *"Fact Bargaining" under the Sentencing Guidelines: The Role of the Probation Department*, 8 Fed Sent R 328, 328 (1996) (describing a survey of probation officers that revealed "widespread perception that fact bargaining is primarily used as a means for the parties to conceal or distort the true facts of the defendant's conduct from sentencing courts").

169 See King, *Judicial Oversight of Negotiated Sentences*, 58 Stan L Rev at 295 (cited in note 168) ("[P]arties can minimize the impact of the presentence report by stipulating in their plea agreement to facts or to applications of factors, hoping the judge will accept their stipulations rather than take the time to adjudicate the accuracy of those facts or issues.").

170 Id at 298 ("Some officers reportedly avoid investigating facts once they learn there is a stipulation, particularly if there is an appeal waiver.").

171 See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am J Comp L 199, 213 (2006) (arguing that fact bargaining exacerbates the threat of "inaccurate and unfair" sentences).

172 See, for example, *United States v Rodriguez*, 162 F3d 135 (1st Cir 1998). In *Rodriguez*, six defendants were indicted for conspiracy to distribute cocaine. Three pled guilty, receiving sentences of time served, seventeen months, and sixty months respectively. The other three stood trial and received 235 months, 262 months, and life imprisonment. See also Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 Yale L J 204, 211–19 (1956)

Second, plea bargains themselves may vary with "lawyer quality, agency costs, bail and detention rules . . . and information deficits."[173] While the former source of disparity may not be problematic,[174] the latter systematically disfavors underprivileged defendants.[175] Judicial oversight is a basic if imperfect method to reduce disparity.[176]

If denied an opportunity to contest the sentencing decision, parties will expend more effort to control the parameters in that decision. These incentives encourage fact bargaining.[177] If collusive stipulation and fact management become the only means for assuring a sentence both parties believe is just, even the most selfless, talented, and underworked prosecutors and defense attorneys will engage in these practices. That scrupulous and capable attorneys engage in these practices may not be a problem; after all, they have far more information as to the strengths and particulars of a given case than the judge. The problem is that these practices will gain a broader legitimacy if in some instances they are the surest means of achieving an equitable result. Sadly, not all negotiations between a prosecutor and a defense attorney produce a proper sentence—invariably, some results call for judicial correction.[178] In these cases, fact bargaining cripples the corrective mechanism as it leaves a judge unable to determine whether the sentence fits all available evidence of the crime.

Booker's impact on plea bargaining has been debated. Some have suggested that increased judicial discretion will diminish prosecutorial

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(presenting a survey of federal judges, in which the respondents provide three reasons why defendants who stand trial receive more severe sentences: (1) because the judge is convinced the defendant committed perjury in conducting her defense; (2) because the defendant presented a frivolous defense; and (3) because the brutal circumstances of the crime were portrayed more vividly at trial).

173 See Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 Harv L Rev 2463, 2465–69 (2004).

174 See *Scott v United States*, 419 F2d 264, 389 (DC Cir 1969):

> Superficially it may seem that . . . the defendant who insists upon a trial [and] is found guilty pays a price for the exercise of his right when he receives a longer sentence than his less venturesome counterpart who pleads guilty. In a sense he has. But the critical distinction is that the price he has paid is not one imposed by the state to discourage others from a similar exercise of their rights, but rather one encountered by those who gamble and lose.

175 See Bibas, 117 Harv L Rev at 2485–86 (cited in note 173) (explaining that indigent defendants are more likely to be represented by an inexperienced or overloaded public defender, who "may not understand the benefits of quick cooperation or . . . may be less skilled in persuading prosecutors to offer agreements to their clients").

176 See King, 58 Stan L Rev at 305–06 (cited in note 168) (arguing for increased oversight to reduce disparity).

177 See *Booker*, 543 US at 290 (Souter dissenting) (explaining how parties employ fact bargaining to retain power over sentencing).

178 See FRCrP 11(e) and Advisory Committee Notes (1974 Amendment) (explaining that "there has been a lack of effective judicial review of the propriety of the agreements, thus increasing the risk of real or apparent unfairness").

power and discourage bargains.[179] Others have argued that the additional risk has not discouraged bargaining, but only affected the price thereof.[180] A third possibility is that parties will adjust to *Booker* through increased fact bargaining. By limiting judicial access to details of the offense, parties may replace mandatory sentencing with standardized narratives maintaining the balance of power between judges and parties. This is a dangerous possibility because it would thwart the aims of particularized sentencing.[181] As discussed above, fact bargaining prevents judicial error correction, thus threatening uniform, nondiscriminatory sentencing. Given the additional pressure on parties to bargain facts, it is especially dangerous to legitimate such bargaining following *Booker*. Accordingly, trial courts should offer parties an alternative check on sua sponte sentencing determinations. Affording parties notice and an opportunity to comment provides one such alternative without diminishing trial courts' newly found discretion.

CONCLUSION

The disagreement over a notice requirement exposes a general failure of federal courts to reassess the concept of departure post-*Booker*. Of course, federal courts are somewhat free to develop procedure through common law, as some circuits have already done so by requiring an independent determination that a non-Guidelines sentence is warranted before such a sentence may be imposed. Those circuits that do adopt new procedures for imposing § 3553(a) factors should acknowledge their innovations rather than point to excised code sections. Further, these circuits should follow Rule 32(i)(1)(C) as read by *Burns* and provide notice prior to sua sponte impositions of non-Guidelines sentences. In the remaining circuits, concerns for administrative efficiency are likely outweighed by considerations of accuracy, participation, and effective oversight of plea bargaining. The preponderance of these latter concerns suggests that, even in these circuits, notice should be required prior to sua sponte impositions of non-Guidelines sentences. Such a requirement would not contradict

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179 See, for example, *Booker*, 543 US at 289 (Scalia dissenting) (arguing that *Booker* "eliminated the certainty of expectations in the plea process").

180 See Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 Stan L Rev 1721, 1741 (2005):

> Defense attorneys and prosecutors, repeat players all, will probably be able to make reasonably informed guesses about expected sentences. Thus, the additional discretion provided under *Booker*'s approach to sentencing may affect the "price" of the plea bargain, but it is not likely to prevent the parties from agreeing on a deal.

181 See Fifteen Years Report at 25 (cited in note 29) (detailing the inequities of "charge only" sentencing wherein only the criminal charge is alleged and not the criminal act).

Booker's demotion of the Guidelines to advisory status. Rather, it would provide a check on sentencing discretion, introducing a stage of self-correction prior to imposition of a drastic sentence.

Before concluding, it is worthwhile to compare the opportunities to challenge conclusions at the trial level afforded to parties in criminal proceedings to those afforded parties in civil proceedings.

It turns out that civil litigants benefit from notice requirements similar to those argued for in this Comment. Rule 59(e) of the Federal Rules of Civil Procedure allows parties ten days to ask the court to amend a judgment. These motions provide parties a chance to ask the trial court to reconsider "matters properly encompassed in a decision on the merits."[182] A notice requirement prior to sua sponte variances would provide parties to a criminal trial with a similar opportunity to ask the trial judge to reconsider his or her determination.

This comparison raises three important questions. Are the costs of reviewing a non-Guidelines sentence any higher than the costs of reviewing a civil judgment? Are the benefits of assuring accurate sentences—especially when those sentences are extraordinary relative to most imposed for a particular offense—inferior to those of assuring accurate damages? Finally, what values does our justice system announce when we install higher procedural safeguards prior to deprivations of property than prior to deprivations of liberty and life?

182 *White v New Hampshire Department of Employment Security*, 455 US 451, 451 (1982).