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Extracting Compassion from Confusion: Sentencing Noncitizens After United States v. Booker

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NOTES

EXTRACTING COMPASSION FROM CONFUSION: SENTENCING NONCITIZENS AFTER *UNITED STATES V. BOOKER*

*Francesca Brody**

A noncitizen facing a federal judge for sentencing confronts a demonstrably different future than an otherwise identical citizen. Deportation, immigration detention, harsher prison conditions, and a longer actual sentence may all await the noncitizen federal inmate. The U.S. Courts of Appeals have disagreed as to whether a district judge can consider those consequences in crafting a sentence under the U.S. Sentencing Guidelines.

This Note argues that the circuit split results from circuit courts' varying appellate scrutiny of sentencing decisions after United States v. Booker. *To resolve the split, this Note encourages the U.S. Sentencing Commission to adopt an amendment to the Guidelines, thereby promoting uniformity among sentencing courts. As an alternative, this Note argues that it is proper for sentencing courts to consider alienage under 18 U.S.C. § 3553.*

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INTRODUCTION

Noe Ferreria was a thirty-nine year old permanent resident of the United States, having emigrated from Mexico at age fifteen.[1] Gainfully employed as a truck driver and a "devoted father," Ferreria lived with his five children, all U.S. citizens, and their mother, his companion of over a

1. *See* United States v. Ferreria, 239 F. Supp. 2d 849, 851 (E.D. Wis. 2002).

decade.[2] He entered the United States legally and had never before been convicted of a crime.[3] Despite his twenty-five year history in the United States, when Ferreria pleaded guilty to conspiracy to distribute cocaine,[4] his residency status subjected him to near certain deportation to Mexico at the conclusion of his prison sentence.[5] Thus, in addition to the primary consequences of his conviction, Ferreria stood likely to be "kicked out"[6] of the country that had become his home, "lose his family,"[7] and be forced to return to a nation where he had not lived since childhood.[8]

Federal courts have disagreed as to whether these and other immigration consequences of a criminal conviction should be offset by a downward departure or variance from the U.S. Sentencing Guidelines (Guidelines) recommendation. In *United States v. Ferreria*, the court found that the "extraordinary hardship" of deportation merited a downward departure from the sentence recommended by the Guidelines.[9] In so holding, *Ferreria* followed the U.S. Court of Appeals for the D.C. Circuit,[10] the U.S. Court of Appeals for the Seventh Circuit,[11] and several district courts,[12] all of which permit consideration of immigration consequences in sentencing, but aligned against a bloc led by the U.S. Court of Appeals for the Second Circuit, which counsels against such consideration in most—if not all—circumstances.[13]

In creating the U.S. Sentencing Commission (Commission) and shaping the Guidelines, Congress was driven by the desire to increase uniformity in sentencing[14] and "secure nationwide consistency."[15] Thus, when courts diverge in their recognition of a basis for variance, the central purpose of the Guidelines is stymied. Noncitizens make up forty-seven percent of defendants in federal court,[16] and many will face deportation.[17] The

2. *Id.* at 855.
3. *See id.*
4. *See id.* at 849.
5. *See id.* at 851; *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2006) (rendering deportable any alien convicted of a controlled substance offense).
6. *Ferreria*, 239 F. Supp. 2d at 853.
7. *Id.* at 855.
8. *See id.*
9. *Id.* at 856.
10. *See* United States v. Smith, 27 F.3d 649, 655 (D.C. Cir. 1994).
11. *See* United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997).
12. *See, e.g.*, United States v. Pacheco-Soto, 386 F. Supp. 2d 1198, 1206 (D.N.M. 2005); United States v. Bakeas, 987 F. Supp. 44, 44–45 (D. Mass. 1997).
13. *See* United States v. Restrepo, 999 F.2d 640, 645–47 (2d Cir. 1993); *infra* note 251 and accompanying text; *see also* United States v. Wills, 476 F.3d 103, 107 (2d Cir. 2007).
14. *See* United States v. Booker, 543 U.S. 220, 253 (2005) (Breyer, J., delivering the opinion of the Court in part).
15. Gall v. United States, 552 U.S. 38, 49 (2007).
16. *See* U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT tbl.26 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2010_Quarter_Report_4th.pdf. Factoring out immigration offenses, 21.76% of offenders are noncitizens. *See id.* The vast majority of these nonimmigration offenders face drug trafficking charges, with fraud charges a distant second. *See id.*

intermingling of immigration consequences with the modern federal sentencing scheme poses far-reaching questions to proponents of fair and consistent sentencing.[18] For these reasons, in January 2010, the Commission sought public comments on whether it should amend the Guidelines to address these issues.[19]

This Note explains the legal conflict over consideration of the consequences of alienage in federal sentencing and argues that since *United States v. Booker*,[20] sentencing courts can consider the immigration consequences at issue. Part I of this Note details the modern federal sentencing scheme, immigration law and policy, and the intermingling of these two fields when noncitizens are sentenced in federal courts. Part II describes the split among federal courts as to the propriety of considering various immigration consequences when crafting a sentence. Part III of this Note argues that the Guidelines should be amended to recognize deportability as a proper sentencing factor, and in the absence of such a reform, sentencing courts should consider the consequences of immigration under Congress's command to mete out sentences that are "sufficient, but not greater than necessary"[21] in furtherance of other explicit statutory sentencing goals.

I. THE FEDERAL SENTENCING SCHEME, IMMIGRATION LAW, AND THEIR OVERLAP

Part I.A examines modern federal sentencing from the promulgation of mandatory guidelines through the U.S. Supreme Court's seminal decision in *United States v. Booker*, and subsequent analyses of the advisory guidelines scheme. Part I.B considers the contours of immigration law, describing who can be removed for what offenses, and touches upon the debate over the jurisprudential formalism that deportation is not a form of punishment. Part I.C describes the interaction between sentencing and immigration law and the particular burdens that noncitizen inmates face.

17. Per 8 U.S.C. § 1101(a)(43)(B) (2006), "drug trafficking crime[s]" are aggravated felonies, convictions for which noncitizens are deportable under 8 U.S.C. § 1227(a)(2)(A)(iii).

18. *See* Letter from Laura W. Murphy, Dir., ACLU Wash. Legislative Office, to U.S. Sentencing Comm'n 3–5 (Mar. 22, 2010), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/ACLU_Murphy_Comments.pdf [hereinafter Murphy Letter] (urging the Commission to adopt provisions for downward departures to address the effects of deportation and disparate treatment of noncitizen prisoners). In December 2010 at the close of his term, New York Governor David Paterson granted pardons to several people whose convictions would have subjected them to deportation, a consequence the Governor felt was needlessly harsh. *24 Immigrants Pardoned by Governor*, N.Y. TIMES, Dec. 25, 2010, at A23.

19. *See* Notice of Proposed Amendments to Sentencing Guidelines, 75 Fed. Reg. 3525, 3531 (Jan. 21, 2010).

20. 543 U.S. 220 (2005).

21. 18 U.S.C. § 3553(a) (2006).

A. Federal Sentencing: Courts, Congress, and the Commission

This section describes the development of federal sentencing law in three central law-making bodies: Congress, the Supreme Court, and the Commission. As these bodies modify the allocation of sentencing power, the proper consideration of alienage consequences changes as well.

1. Judicial Discretion at Its Apex: Pre-Guidelines Federal Sentencing

Throughout U.S. history, the underlying rationale for meting out criminal punishment has shifted, and as the rationale shifts, so too does the sentencing process.[22] From the outset of the American republic, criminal punishment had a retributive focus, and legislatures set the punishment for a particular crime.[23] Gradually, retributive sentencing gave way to reform models.[24] Thus, for a century prior to the enactment of the Guidelines, United States criminal systems used schemes of "indeterminate sentencing"[25] where rehabilitation was the primary rationale for criminal punishment.[26] Constrained only by statutory maximums and minimums, judges applied sentences with a great degree of discretion,[27] and rehabilitated prisoners were released upon the decision of corrections officers, often many years before the expiration of the sentence the court had imposed.[28] In the system of indeterminate sentencing, virtually no appellate review took place.[29]

One prominent critic, U.S. District Court Judge Marvin E. Frankel, criticized the "unchecked and sweeping powers" of judges in the indeterminate sentencing model, and called that discretion "terrifying and

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22. *See infra* notes 23–28, 47 and accompanying text.

23. *See* United States v. Grayson, 438 U.S. 41, 45–46 (1978) (describing the changing rationales for punishment in the United States from the late eighteenth century through the mid-twentieth century). Capital punishment was quite common in the colonial era. *See* Alan M. Dershowitz, *Criminal Sentencing in the United States: An Historical and Conceptual Overview*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 125 (1976). For lesser crimes, legislatures imposed fines, whippings, and time in the stocks. *Id.* Incarceration was not typically employed as a post-conviction form of punishment until after the American Revolution. *Id.*

24. *See Grayson*, 438 U.S. at 46; Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893 (1990).

25. Mistretta v. United States, 488 U.S. 361, 363 (1989). Sentences were indeterminate due to a parole board's determination of when they would end, *see id.* at 365, and to judges' ability to sentence a defendant to a broad range, such as ten years to life. *See* Dershowitz, *supra* note 23, at 128–29.

26. *See Mistretta*, 488 U.S. at 363 (stating that pre-Guidelines sentencing was based on "a view that it was realistic to attempt to rehabilitate the inmate"); Nagel, *supra* note 24, at 893 (describing the advent of rehabilitative punishment in 1870); *cf.* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 7 (1973) (arguing that "legislators . . . have neglected even to sketch democratically determined statements of basic purpose").

27. FRANKEL, *supra* note 26, at 5.

28. *See Mistretta*, 488 U.S. at 364–65.

29. *See* Symposium, *Appellate Review of Sentences*, 32 F.R.D. 249, 259–60 (1962); Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After* Kimbrough, 93 MARQ. L. REV. 717, 719 (2009).

intolerable for a society that professes devotion to the rule of law."[30] According to Judge Frankel, this discretion-laden scheme resulted in sentences that lacked uniformity, order, and equality.[31] While the system sought to impose sentences that were individualized, according to Judge Frankel, the resulting punishments were instead the result of "character, bias, neurosis, and daily vagary."[32]

2. Congress Steps In: The Sentencing Reform Act of 1984

Concerns about excessive judicial discretion[33] and unequal sentences for similarly situated defendants[34] motivated the enactment of the Sentencing Reform Act of 1984 (SRA).[35] The SRA created the Commission, an independent agency in the judicial branch charged with establishing federal sentencing policy to "provide certainty and fairness in meeting the purposes of sentencing" and reduce "unwarranted sentencing disparities."[36] The SRA also spelled out duties of the Commission and indicated what factors it might consider in crafting a set of guidelines.[37]

Congress had three objectives in establishing the Commission and the Guidelines. First, it sought to increase transparency in sentencing by avoiding the "implicit deception" that exists when a judge imposes a sentence and a parole board determines how much of that sentence is actually served.[38] Second, Congress pursued increased uniformity by narrowing the range of sentences imposed for similar conduct.[39] Third, it intended that sentences be proportionate to the offense, with increasingly severe sentences for increasingly severe crimes.[40]

Congress articulated several traditional goals of sentencing in the SRA. A sentence should: (1) punish the offender, reflect the gravity of the

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30. FRANKEL, *supra* note 26, at 5.

31. *See id.* at 8–9.

32. *Id.* at 21. Another judge argued that, in the system of indeterminate sentencing, judges generally "behaved badly"—that is, they imposed sentences intended to rehabilitate and deter without any objective basis for their calculation. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 572 (2005).

33. *See* United States v. Booker, 543 U.S. 220, 292–93 (2005) (Stevens, J., dissenting in part) (noting that "[t]he elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim" in enacting the SRA).

34. *See* Mistretta v. United States, 488 U.S. 361, 365 (1989).

35. Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 and 28 U.S.C. §§ 991–998); *see also* Preliminary Observations of the Commission on Commissioner Robinson's Dissent, 52 Fed. Reg. 18,046, 18,133 (May 13, 1987) (noting that Judge Frankel's criticism of disparity spurred sentencing reform).

36. 28 U.S.C. § 991(b)(1)(B) (2006).

37. *Id.* § 994.

38. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2010). Under the system of indeterminate sentencing and parole, inmates typically served only one-third of their sentences. *See id.*; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) (describing Congress's purposes in passing the SRA).

39. U.S.S.G. § 1A1.3; Breyer, *supra* note 38, at 4–5.

40. *See* U.S.S.G. § 1A1.3; Nagel, *supra* note 24, at 905.

offense, and maintain respect for law,[41] (2) deter future offenses,[42] (3) protect the public,[43] and (4) provide the offender with correctional or educational treatment.[44] Under the "parsimony principal,"[45] an offender's term should be "sufficient, but not greater than necessary" to accomplish those ends.[46]

The resulting Guidelines shifted focus away from rehabilitative rationales in sentencing and, some argue, toward retributive rationales.[47] Others fault the Guidelines for failing to adopt one single dominant rationale among the several articulated.[48] The Commission itself stated that the choice of a single guiding philosophy was "unnecessary."[49] Notwithstanding, the Commission has a continuing obligation to update the Guidelines to accord with evolving understandings of criminal justice[50] and takes particular notice of circuit splits in promulgating amendments.[51]

The history of the Guidelines can be split into two major phases: pre-*Booker* and post-*Booker*. From their enactment in 1987 through 2005, the Guidelines were mandatory and judges were required to impose a sentence within the Guidelines range unless a specific provision for departure applied.[52] In 2005, the Supreme Court held in *Booker* that the mandatory Guidelines were unconstitutional, and rendered them advisory to preserve

41. 18 U.S.C. § 3553(a)(2)(A) (2006).

42. *Id.* § 3553(a)(2)(B).

43. *Id.* § 3553(a)(2)(C).

44. *Id.* § 3553(a)(2)(D).

45. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005) (describing parsimony as "a preference for the least severe alternative that will achieve the purposes of the sentence").

46. 18 U.S.C. § 3553(a); *see also* Frase, *supra* note 45, at 82 (noting that § 3553(a) expresses the parsimony principal).

47. *See* 28 U.S.C. § 994(k) (2006) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . ."); Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 6–7 (2010) (arguing that the Guidelines repudiated rehabilitation as the primary function of incarceration, and elevated retribution to the dominant sentencing rationale).

48. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 26 (2003). *But cf.* Dershowitz, *supra* note 23, at 122 (noting the utility of imprisonment as a form of crime reduction because it "conveniently combines" mechanisms for the various goals of punishment).

49. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2010).

50. Congress has instructed the Commission, in consultation with other federal legal organizations, to "periodically" review the Guidelines, and the Commission may submit amendments each spring, which become effective if Congress does not object to them. *See* 28 U.S.C. § 994(o)–(p).

51. *See* Notice of Proposed Priorities, 75 Fed. Reg. 41,927 (July 19, 2010) (indicating that the resolution of conflicting interpretations of the Guidelines is a Commission priority). The Commission has recently addressed certain immigration-related departures. *See infra* notes 183–185 and accompanying text.

52. 18 U.S.C. § 3553(b) (2006), *invalidated by* United States v. Booker, 543 U.S. 220 (2005); *see also* Symposium, *Federal Sentencing Under "Advisory" Guidelines: Observations By District Judges*, 75 FORDHAM L. REV. 1, 6 (2006) (statement of Hon. Nancy Gertner) ("Over time, judicial departures were seen as a lack of compliance with the Guidelines.").

their adherence to the Sixth Amendment's jury trial guarantee.[53] *Booker* required that a sentence be informed not only by the Guidelines range but also by the factors set forth in 18 U.S.C. § 3553(a).[54] Through both phases, the proper calculation of a Guidelines sentence remained the same,[55] but the influence of that calculation on the ultimate sentence decreased.[56] In the Guidelines' three-decade history, the Court and Congress have modified the level of appellate scrutiny of a sentence several times.

3. The Guidelines Computation, Departures, and Variances

The Guidelines lay out a step-by-step process to usher sentencing judges to a recommended range.[57] A judge calculates a score by determining the "offense level"[58]—based on the crime committed with adjustments for certain factors, such as whether the defendant played a major or a minor role in the offense[59]—and a "criminal history" score, which considers the prior offenses of the defendant.[60] The judge arrives at an offense score between one and forty-three, and a criminal history categorization between one and six.[61] A sentencing table[62] provides a narrow[63] recommended sentence range based on the combination of these two scores.

As enacted, the Guidelines were mandatory.[64] A court was required to sentence within the Guidelines recommendation unless one of two situations permitting departure existed.[65] First, if a Guidelines-based provision for departure applied, the court could decrease a sentence on that basis.[66] Otherwise, a judge could depart upon finding that aggravating or mitigating factors made a case fundamentally different from what the Guidelines contemplated[67]—that is to say, the case fell outside the "heartland."[68] Regardless, the Commission expected departures to be

53. *See Booker*, 543 U.S. at 226–27 (Stevens, J., delivering the opinion of the Court in part).

54. *See id.* at 245–46 (Breyer, J., delivering the opinion of the Court in part); Symposium, *supra* note 52, at 4 (statement of Hon. Lynn Adelman).

55. *See Booker*, 543 U.S. at 245 (Breyer, J., delivering the opinion of the Court in part).

56. *See* Symposium, *supra* note 52, at 4 (statement of Hon. Lynn Adelman) (noting that with *Booker*, the primary sentencing focus shifted from the Guidelines to 18 U.S.C. § 3553(a)).

57. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2010).

58. *Id.* § 2.

59. *Id.* § 3B1.2.

60. *Id.* § 4A1.1.

61. *Id.* § 5A.

62. *Id.* According to one district judge, under the mandatory Guidelines scheme, "the grid was God." Symposium, *supra* note 52, at 4 (statement of Hon. Lynn Adelman).

63. U.S.S.G. § 1A1.2.

64. 18 U.S.C. § 3553(b)(1) (2006) (stating that a "court shall impose a sentence" in compliance with the Guidelines).

65. *See id.*

66. *See* U.S.S.G. §§ 5K1.1, 5K2.1–.24 (providing bases for upward and downward departures, including substantial assistance to authorities, the use of a dangerous weapon, and diminished capacity).

67. *See id.* § 5K2.0.

68. *Id.* § 1A4(b); *see* Koon v. United States, 518 U.S. 81, 93 (1996) (citing U.S.S.G. § 1A4(b)) (describing the Guidelines' applicability as reaching a "heartland" or a

rare.[69] The SRA instituted a multi-pronged scheme of appellate review, with varying levels of scrutiny applying depending on the type of deviation from the Guidelines range.[70]

The Guidelines do not discuss alienage consequences as sentencing factors,[71] however recent modifications have increased the focus on alienage.[72] While national origin is explicitly prohibited from consideration,[73] alienage and deportability are not.[74]

4. The Tug-of-War Continues: Judicial and Legislative Reactions to the Guidelines

Since their inception, the Guidelines have faced serious legal challenges.[75] In the Guidelines' lifespan, their model for federal sentencing has witnessed a tug-of-war between various loci of sentencing power—the legislative and judicial branches, depending on the higher prioritization of uniformity or judicial discretion,[76] and, relatedly, between trial and appellate courts, in determining the proper amount of appellate scrutiny for the sentence imposed.[77] Per the Commission's mandate,[78] the Guidelines are regularly amended to better suit evolving criminal justice standards.[79]

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representative set of cases, and leaving sentencing judges the discretion to depart when particular factors make a case "unusual").

69. U.S.S.G. § 1A1.3 ("Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.").

70. *See* United States v. Booker, 543 U.S. 220, 308 & n.7 (2005) (Scalia, J., dissenting in part).

71. *See* United States v. Lopez-Salas, 266 F.3d 842, 846 (8th Cir. 2001) ("Other than for crimes related directly to alien status, such as illegal re-entry into the country, the guidelines do not mention the effects of alien status as a departure factor."). This Note addresses convictions for nonimmigration crimes. Because immigration crimes are generally committed by noncitizens who are likely to face immigration consequences, courts have found that the Guidelines implicitly take those consequences into consideration. *See, e.g.*, United States v. Garay, 235 F.3d 230, 233 & n.15 (5th Cir. 2000). Thus, those offenses and offenders are outside the scope of this Note.

72. *See infra* Part I.A.5.

73. U.S.S.G. § 5H1.10.

74. See *United States v. Restrepo*, 999 F.2d 640, 643–44 (2d Cir. 1993), for the distinction between considering national origin and alienage.

75. For example, in 1989, the Supreme Court held that the Guidelines were constitutional on separation of powers and non-delegation grounds. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989).

76. *See Statements of Sens. Kennedy and Leahy Supporting the JUDGES Act*, 15 FED. SENT'G REP. 372, 372 (2003) (statement of Senator Kennedy in support of repeal of portions of the Feeney Amendment to return discretion to sentencing judges); *see also* United States v. Booker, 543 U.S. 220, 233 (2005) (Stevens, J., delivering the opinion of the Court in part) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

77. *See* Koon v. United States, 518 U.S. 81, 98–100 (1996) (noting the Government's position that more stringent appellate review furthers the goal of uniformity); *In re* Sentencing, 219 F.R.D. 262, 262 (E.D.N.Y. 2004) ("In effect, primary sentencing authority is shifted to the appellate judges whenever a trial court provides a lower sentence than do the Guidelines matrices. For a judge to exercise what amounts to original power to sentence without actually seeing the person being sentenced is contrary to American tradition, as recognized in *Koon*.").

i. Initial Responses to the Mandatory Guidelines

Nine years after the Guidelines went into effect, the Supreme Court significantly increased district court discretion. In *Koon v. United States*,[80] the Court held that so long as a factor is not expressly prohibited in the Guidelines, it may be considered for a downward departure.[81] By weighing in on how to interpret silence in the Guidelines, the Court widened sentencing courts' ability to depart.[82] The Court clarified that the Guidelines only intend to reach a "heartland" of cases, and departures may be appropriate for cases outside of that paradigmatic set.[83] The *Koon* Court noted that the SRA "authorizes [departure] in cases that feature aggravating or mitigating circumstances of a kind or degree not adequately taken into consideration by the Commission."[84] Furthermore, the Court held that sentencing decisions should receive abuse of discretion review on appeal.[85]

ii. The PROTECT Act

In 2003, Congress drastically altered sentencing procedure with the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (PROTECT Act).[86] Primarily aimed at targeting the sexual exploitation of children, the PROTECT Act also contained the Feeney Amendment,[87] which aimed to further increase sentence uniformity and decrease judicial discretion.[88] The resulting legislation limited courts' ability to depart downward, instituted de novo appellate review of downward departures, required reports to Congress for downward departures, and forbade the Commission from adding any new grounds for departure to Chapter 5K for two years.[89] Despite its otherwise hard line against downward departures, the PROTECT Act also endorsed early

78. *See supra* notes 50–51 and accompanying text.

79. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A2 (2010); *supra* note 50.

80. 518 U.S. 81 (1996).

81. *Id.* at 94.

82. *See id.* at 96.

83. *Id.* at 93–94 (citing U.S. SENTENCING GUIDELINES MANUAL § 1A4(b) (1995)).

84. *Koon*, 518 U.S. at 94; *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0, cmt. n.3 (2010).

85. *See Koon*, 518 U.S. at 100; *see also* 18 U.S.C. § 3742 (2006) (setting out the bases for appeal and standards of review for various sentencing decisions).

86. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of U.S.C. Titles 18, 21, 28, 42, and 47).

87. *Id.* § 401, 117 Stat. at 667 (codified at 18 U.S.C. §§ 3553, 3742 and 28 U.S.C §§ 991, 994 (2006)).

88. *See* Tom Feeney, *Reaffirming the 1984 Sentencing Reforms*, 27 HAMLINE L. REV. 383, 385 (2004) (indicating that the purpose of the Feeney Amendment was to decrease the rate of downward departures and reduce disparities in sentencing).

89. *See* § 401, 117 Stat. at 673–76; *see also* Mark H. Allenbaugh, *Who's Afraid of the Federal Judiciary? Why Congress' Fear of Judicial Sentencing Discretion May Undermine a Generation of Reform*, THE CHAMPION, June 2003, at 6, 8 (calling the Feeney Amendment a sentencing "coup d'état"). One district judge resigned in protest to the changes that, in his view, were unjustly rigid and designed to intimidate sentencing judges into sentencing within the Guidelines. *See* John S. Martin, Jr., Op-Ed., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31.

disposition, or "fast track," programs.[90] Under those programs, U.S. Attorneys in certain specified border states had authorized downward departures for those charged with illegal reentry in exchange for a waiver of certain procedural rights.[91]

iii. United States v. Booker

Congress's effort to limit judicial discretion was largely undone, however, with the Supreme Court's seminal decision in *United States v. Booker*.[92] The Court issued two majority opinions in *Booker*.[93] The first, known as the "merits opinion," was written by Justice John Paul Stevens, and held that mandatory guidelines violate a defendant's Sixth Amendment right to trial by jury.[94] The Court held that by requiring a sentencing judge to find facts beyond those that the jury used to convict, and by calling for judges to increase sentences on the basis of facts not found beyond a reasonable doubt, the Guidelines interfere with the jury trial right.[95] Justice Breyer's "remedial opinion" determined that congressional intent counseled severing and invalidating the mandatory provisions to make the Guidelines advisory, thereby avoiding the constitutional issue.[96] The full Court agreed that a sentencing judge's exercise of discretion does not violate the Sixth Amendment in the way that mandatory application of facts does.[97]

Booker's effect was thus to allow a sentencing court to consider the factors enumerated in 18 U.S.C. § 3553 in addition to the properly calculated Guidelines range.[98] Accordingly, a post-*Booker* sentencing court has more options than a pre-*Booker* court. It can sentence within the Guidelines range, depart from the Guidelines as before, or apply a variance under § 3553(a).[99] Therefore, the law on Guidelines departures from before

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90. *See* § 401(m)(2)(B), 117 Stat. at 675; U.S SENTENCING GUIDELINES MANUAL § 5K3.1 (2010).

91. *See* Thomas E. Gorman, Comment, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U. CHI. L. REV. 479, 489–90 (2010) (arguing that fast track sentencing's better allocation of resources reduces disparity because far fewer cases of illegal reentry go unprosecuted).

92. 543 U.S. 220 (2005).

93. Five Justices joined each opinion, and Justice Ginsburg was the only Justice to join both. The four other Justices that joined the "merits opinion"—the opinion that decided that the mandatory Guidelines were unconstitutional—all dissented from the remedial opinion—the portion that rendered the Guidelines advisory—and vice versa. *See id.* at 226, 244, 272, 313, 326; Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 345–46 (2006) (describing the makeup of the "dueling majorities").

94. *Booker*, 543 U.S. at 226–27 (Stevens, J., delivering the opinion of the Court in part).

95. *Id.* at 232, 244.

96. *Id.* at 245–46 (Breyer, J., delivering the opinion of the Court in part).

97. *Id.* at 233 (Stevens, J., delivering the opinion of the Court in part) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.").

98. *Id.* at 245–46 (Breyer, J., delivering the opinion of the Court in part).

99. *See supra* notes 66–68, 98 and accompanying text. Since *Booker*, the viability of the "departure" terminology has been questioned. *See* Thomas Withers, *Supreme Court—Defendants Not Entitled to Notice of Variance from Guideline Sentence*, FED. CRIM. DEF.

Booker remains valid, but following *Booker*, a factor that did not form the basis for a departure may nonetheless justify a downward variance.[100]

A variance is a divergence from the Guidelines recommendation based on factors outside the Guidelines framework.[101] Section 3553(a) requires determining a sentence with a view toward Congress's purposes of punishment.[102] Thus, under advisory Guidelines, courts must consider "the nature and circumstances of the offense and the history and characteristics" of the offender[103] and the various types of sentence available,[104] including imprisonment, fines, or probation. The court must take account of "the need to avoid unwarranted sentence disparities"[105] among similarly situated defendants.[106]

The *Booker* opinions do not provide a clear mandate to district courts.[107] While the merits opinion in *Booker* has been interpreted to give judges carte blanche to vary from the Guidelines,[108] under the remedial opinion,

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BLOG (June 15, 2008, 5:00 PM) http://www.federalcriminaldefenseblog.com/tags/variances/ (calling departures "a deceased creature" of the pre-*Booker* era). However, as the language of departure remains in the Guidelines, this Note will use "departure" to refer to divergences from the Guidelines range that rely on the Guidelines themselves, and "variance" to distinguish divergences based on § 3553 dictates. *See* U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 57 (2006), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

100. *See Booker*, 543 U.S. at 245–46.

101. *See* United States v. Castro-Rivas, 254 F. App'x 742, 743 n.1 (10th Cir. 2007).

102. *See* 18 U.S.C. § 3553(a) (2006); *supra* notes 41–44 and accompanying text.

103. 18 U.S.C. § 3553(a)(1).

104. *Id.* § 3553(a)(3).

105. *Id.* § 3553(a)(6).

106. This seemingly simple command is not without controversy. *Compare* Breyer, *supra* note 38, at 13 ("Uniformity essentially means treating similar cases alike."), *with* Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997) (arguing that "disparity is not a self-defining concept" and for uniformity to have any meaning, it must be undergirded by a coherent philosophy of punishment).

107. *See* Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After* United States v. Booker, 41 U. RICH. L. REV. 625, 631 (2007); *see also* Spears v. United States, 129 S. Ct. 840, 846 (2009) (Roberts, C.J., dissenting) ("*Apprendi*, *Booker*, *Rita*, *Gall*, and *Kimbrough* have given the lower courts a good deal to digest over a relatively short period."). It is worth noting that in addition to criticism, *Booker* has received praise as an improvement over the mandatory Guidelines regime. *See, e.g.*, U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.19 (2010), *available at* http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf [hereinafter JUDGES' SURVEY] (finding that 75% of district judges think that the post-*Booker* advisory Guidelines best achieve the purposes of sentencing, whereas 3% believe that mandatory Guidelines are better suited to those ends); Berman, *supra* note 93, at 343 (arguing that *Booker*'s changes mostly improved federal sentencing); Symposium, *supra* note 52, at 7 (statement of Hon. Nancy Gertner) (quoting Ryan S. King & Marc Mauer, *Sentencing With Discretion: Crack Cocaine Sentencing After* Booker, 18 FED. SENT'G REP. 134, 144 (2005)) (calling *Booker* an opportunity for more thoughtful and rational sentencing decisions).

108. *See* United States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) ("District judges are, as a result [of *Booker* and its progeny], generally free to impose sentences outside the recommended range.").

sentencing courts are nonetheless required to consider the Guidelines[109] and are subject to appellate review for procedural and substantive unreasonableness.[110] These holdings create a tension that makes *Booker* difficult to apply.[111]

iv. Understanding Booker*:* Rita, Gall, Kimbrough, Spears, *and* Ice

Subsequent Supreme Court decisions aimed to clarify the post-*Booker* applicability of the Guidelines. The Court sought to settle disagreements over the weight the Guidelines recommendation should carry[112] and relatedly, the amount of appellate scrutiny that should be applied to a sentence outside of the Guidelines.[113] The Court's pronouncements generally indicated the breadth of the sentencing judge's discretion to sentence outside the Guidelines based on factors that are not specific to a particular defendant.[114]

In *Rita v. United States*,[115] the Court held that a sentencing court may not presume that the Guidelines calculation is reasonable.[116] An appellate court may apply a presumption of reasonableness,[117] though importantly, courts of appeals may not apply a presumption of unreasonableness to sentences outside the Guidelines.[118] *Rita* thus maintained the Guidelines' overall relevance.[119] In *Gall v. United States*,[120] the Court found that a court of appeals may not set a circuit rule that requires "extraordinary circumstances" to warrant a departure from the Guidelines.[121] In other words, a sentencing court may issue a variance even though the case before it is a typical one.

On the same day that *Gall* was issued, the Court handed down its decision in *Kimbrough v. United States*.[122] In *Kimbrough*, the U.S. District Court for the Eastern District of Virginia had issued a sentence below the Guidelines range, expressing disagreement with the inconsistent treatment of powder versus crack cocaine, and finding that the Guidelines recommendation was greater than necessary to satisfy Congress's

109. United States v. Booker, 543 U.S. 220, 245 (2005) (Breyer, J., delivering the opinion of the Court in part).

110. *See* Gall v. United States, 552 U.S. 38, 51 (2007); *Booker*, 543 U.S. at 261.

111. *See* Berman, *supra* note 93, at 355 ("[T]he Supreme Court in *Booker* ultimately raised more questions than it answered concerning the day-to-day particulars of operating an advisory sentencing guideline system."); David J. D'Addio, *Sentencing After* Booker*: The Impact of Appellate Review on Defendants' Rights*, 24 YALE L. & POL'Y REV. 173, 173 (2006).

112. *See infra* notes 115–34 and accompanying text.

113. *See infra* notes 144–62 and accompanying text.

114. *See infra* notes 125–28, 286 and accompanying text.

115. 551 U.S. 338 (2007).

116. *Id.* at 354–55.

117. *Id.* at 347.

118. *Id.* at 354–55.

119. *See infra* note 174 and accompanying text.

120. 552 U.S. 38 (2007).

121. *Id.* at 47.

122. 552 U.S. 85 (2007).

sentencing objectives.[123] The U.S. Court of Appeals for the Fourth Circuit reversed, holding that it was "per se unreasonable" for the district court to vary from the Guidelines based solely on its disagreement with the underlying policy that the Guidelines espoused and the resulting disparity between crack and cocaine sentencing.[124] The Supreme Court reversed, holding that a sentencing "judge may determine . . . that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing."[125] In other words, a court is entitled to read the broad dictates of the § 3553(a) factors to trump the Guidelines recommendation.[126] The Court further noted that since *Booker*, "some departures from uniformity were a necessary cost" of honoring the Sixth Amendment through the newly-advisory scheme.[127] The Court reiterated its point in *Spears v. United States*,[128] stating that "district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines."[129]

Adding to the current state of confusion, in 2009 the Court decided *Oregon v. Ice*,[130] which dealt not with the Guidelines, but with the Sixth Amendment's influence on an Oregon statute allowing a judge to find facts for the imposition of consecutive, rather than concurrent, sentences.[131] The Court found that the statute did not violate the Sixth Amendment, deferring to the traditional province of the jury and to the state's ability to craft its criminal law.[132] The *Ice* majority was apparently motivated by the nature of the particular statute that, in the Court's view, constrained judicial discretion by requiring an affirmative finding before the imposition of consecutive sentences, rather than leaving consecutive sentences as a

123. *Id.* at 92–93 (discussing the district court's decision).

124. United States v. Kimbrough, 174 F. App'x 798, 799 (4th Cir. 2006), *rev'd*, 552 U.S. 85 (2007).

125. *Kimbrough*, 552 U.S. at 91 (quoting 18 U.S.C. § 3553(a) (2006)).

126. *Kimbrough*'s mandate remains debatable, however, as some courts have interpreted its grant of discretion broadly, to apply to all Guidelines, while others have interpreted it narrowly, applying only to the crack-cocaine provisions. *Compare* United States v. Corner, 598 F.3d 411, 415 (7th Cir. 2010) ("We understand *Kimbrough* and *Spears* to mean that district judges are at liberty to reject *any* Guideline on policy grounds—though they must act reasonably when using that power."), *with* United States v. Vandewege, 561 F.3d 608, 610 (6th Cir. 2009) (Gibbons, J., concurring) ("Neither *Kimbrough* nor *Spears* authorized district courts to categorically reject the policy judgments of the Sentencing Commission in areas outside of crack-cocaine offenses, as the majority suggests."), *and* Hessick, *supra* note 29, at 718 ("*Kimbrough* tells appellate courts that they must allow district courts to categorically disagree with the sentencing policy underlying the crack cocaine Guideline, but it did not extend that holding to all Guidelines. To the contrary, the Court cautioned that district court disagreements with other Guidelines may be subject to 'closer review' by the courts of appeals.").

127. *Kimbrough*, 552 U.S. at 108.

128. 129 S. Ct. 840 (2009) (per curiam).

129. *Id.* at 843–44.

130. 129 S. Ct. 711 (2009).

131. *See id.* at 714.

132. *Id.* at 717.

potential default.[133] The tension with *Booker* remains significant because the statute unambiguously permits a judge to unilaterally find facts used to increase a defendant's sentence.[134]

v. Appellate Review of Sentencing Decisions

The SRA originally laid out a multi-pronged scheme for the review of a sentence on appeal.[135] In *Koon*, the Supreme Court held that appellate review should be for abuse of discretion.[136] With the enactment of the Feeney Amendment, Congress indicated that all appellate review would be de novo.[137] Congress's purpose in heightening the level of appellate review was to encourage within-Guidelines sentences and discourage departures.[138] De novo review did not last because in addition to excising the statutory provision that made the Guidelines mandatory,[139] the *Booker* remedy also invalidated the mandatory portions of 18 U.S.C. § 3742(e), the SRA's provision establishing a standard of review.[140] The Court interpreted the remaining portions of the statute to call for reasonableness review on appeal.[141]

The level of appellate review is crucial to the implementation of advisory Guidelines.[142] With renewed discretion at the district level, one judge noted that appellate courts take on a vital role in "channel[ing] discretion" and policing "deviations from the norm."[143] However, Justice Scalia's *Booker* dissent draws out the tension between appellate review and non-mandatory Guidelines.[144] On the one hand, increased appellate review may

133. *See id.* at 719 ("It bears emphasis that state legislative innovations like Oregon's seek to rein in the discretion judges possessed at common law to impose consecutive sentences at will.").

134. *See id.* at 720 (Scalia, J., dissenting) (discussing the difficulty of reconciling *Ice* with previous Supreme Court sentencing decisions).

135. *See* 18 U.S.C. § 3742(e) (2006); United States v. Booker, 543 U.S. 220, 308 & n.7 (2005) (Scalia, J., dissenting in part).

136. *See* Koon v. United States, 518 U.S. 81, 99 (1996).

137. *See supra* note 89 and accompanying text.

138. *See* Feeney, *supra* note 88, at 383.

139. *See* 18 U.S.C. § 3553(b) (indicating that the court "shall" sentence as per the Guidelines requirement, unless a basis for departure applies).

140. *Booker*, 543 U.S. at 260 (Breyer, J., delivering the opinion of the Court in part).

141. *Id.* at 260–61.

142. *See* Gerard E. Lynch, *Letting Guidelines Be Guidelines (and Judges Be Judges)*, OSJCL AMICI: VIEWS FROM THE FIELD 1, 5 (Jan. 2008), http://moritzlaw.osu.edu/osjcl/blog/Articles_1/Lynch-final-12-28-07.pdf ("If an ideal sentencing system tries to limit disparity to that which is the inevitable cost of a reasonable method of discretion, appellate review of sentences that appear to go off the reservation is an important component of that system."); *id.* (noting that "there are some cases in which the weight (however strong or slight) given to the guidelines will be the deciding factor" in calculating a sentence under advisory guidelines); Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1383 (1999) (book review) (suggesting that "appellate judges can serve as the coordinators for sentencing judges").

143. James G. Carr, *Some Thoughts on Sentencing Post*-Booker, 17 FED. SENT'G REP. 295, 296 (2005).

144. *Booker*, 543 U.S. at 306 (Scalia, J., dissenting in part) ("If the Guidelines are no longer binding, one would think that the provision designed to ensure compliance with them

be a de facto limit on district court discretion.[145] Yet where district courts have more discretion, closer appellate review becomes necessary if sentencing is to remain faithful to Congress's goal of increased uniformity.[146]

Subsequent to *Booker*, the Court has added to the discourse on appellate review of sentencing in the advisory Guidelines scheme. Although *Gall* rejected heightened scrutiny for sentences outside the Guidelines,[147] and recharacterized the level of appellate scrutiny as requiring abuse of discretion review,[148] the precise nature of that review remains somewhat unclear.[149] Several of the Court's recent holdings elevate district court discretion but simultaneously contain language that seems to encourage scrutiny in appellate review.[150] For example, *Kimbrough* is frequently cited for recognizing district courts' ability to deviate from the Guidelines based on a categorical disagreement—a disagreement with the Guidelines themselves instead of the circumstances a particular defendant presents, at

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would, in its totality, be inoperative. The Court holds otherwise."); Hessick, *supra* note 29, at 717 ("Because appellate review is, by its terms, a limit on district court discretion, the Court's post-*Booker* sentencing jurisprudence is inherently contradictory.").

145. *See* Stephanos Bibas et al., *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1371 (2009).

146. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 8 (2008); *see also Booker*, 543 U.S. at 246 (Breyer, J., delivering the opinion of the Court in part) (noting the remedial opinion's adherence to Congress's intention of increased uniformity).

147. Gall v. United States, 552 U.S. 38, 49 (2007).

148. *Id.* at 56; *see also* Hessick & Hessick, *supra* note 146, at 13–18 (discussing the difference between reasonableness review and abuse of discretion review).

149. *See* U.S. SENTENCING COMM'N, ANNUAL REPORT 26 (2009) (noting the development of circuit splits due to the appellate "courts' continuing efforts to define their role in reviewing sentences for reasonableness in light of the Supreme Court's opinions in *Booker*, *Rita*, *Kimbrough*, [and] *Gall*"); Hessick, *supra* note 29, at 717–18 ("Although obviously intended to clarify appellate review, the Court's opinion in *Kimbrough* has actually led to additional confusion and created new circuit conflicts. . . . [B]ecause strict appellate review would ultimately eliminate district court discretion, the Court has had to twist the appellate process and issue opinions, like *Kimbrough*, that contain facially inconsistent statements.") (footnotes omitted).

150. *See* Hessick & Hessick, *supra* note 146, at 13 ("[P]ortions of *Kimbrough* and *Gall* appear to allow for more searching appellate review of sentencing decisions than the extremely deferential review, endorsed in other portions of those opinions . . . ."). *Compare* Kimbrough v. United States, 552 U.S. 85, 101 (2007) (accepting the Government's argument that "courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines") (alteration in original) (internal quotation marks omitted), *and Gall*, 552 U.S. at 46 (holding that a "rule requiring 'proportional' justifications for departures from the Guidelines range is not consistent with our remedial opinion in *United States v. Booker*"), *with Kimbrough*, 552 U.S. at 109 ("[W]hile the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007))), *and Gall*, 552 U.S. at 50 ("We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one."). *Ice*, the Court's most recent statement on sentencing, stands in stark contrast to the Guidelines cases because it extols the Oregon statute's limitations on judicial discretion. *See Oregon v. Ice*, 129 S. Ct. 711, 719 (2009).

least with respect to crack and cocaine.[151] Yet *Kimbrough* also counsels that, when a district court varies in a prototypical case based on its determination that the Guidelines do not reflect § 3553 considerations, "closer [appellate] review may be in order."[152] By concurrently granting wide, policy-driven discretion to district courts[153] but making that discretion reviewable by appellate courts,[154] the Supreme Court has issued arguably inconsistent instructions about the exercise of sentencing discretion.[155]

In 2009, approximately 8% of sentences were appealed[156] and of those, only 6.5% were reversed.[157] But notably, when the government was the party challenging a sentence,[158] the sentence was reversed 56.3% of the time.[159] As one scholar points out, the government's motive in bringing a criminal appeal is generally rooted in its desire to shape legal rules, rather than win individual cases.[160] By appealing sentences, the government often seeks to modify the definition of "reasonableness" that governs review.[161] The fact that the government wins more than half of its challenges to district court reasonableness underscores the point of *Booker*'s critics—that the specter of reversal is a constraint on sentencing courts and may influence the policies those courts adopt.[162]

Over one quarter of the government's appeals in 2009 challenged application of the § 3553 factors.[163] The terms of § 3553 are so broad,[164] however, that reversal for unreasonableness or abuse of discretion raises questions about how courts reach opposite conclusions when the same § 3553 issue is raised. Conflicting outcomes indicate that the appellate

151. *See supra* note 126.

152. *Kimbrough*, 552 U.S. at 109.

153. *See id.* at 101.

154. *See id.* at 109.

155. *See supra* note 149 and accompanying text.

156. *See* U.S. SENTENCING COMM'N, *supra* note 149, at 33, 44 (2009) (reporting that 6,507 sentences were appealed out of 81,372 reported cases).

157. *Id.* at 44.

158. *See* 18 U.S.C. § 3742(b)(3) (2006) (granting the government the right to appeal a below-Guidelines sentence).

159. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.56a (2009). In contrast, when a defendant appealed a sentence, the sentence was reversed only 6.2% of the time. *Id.* at tbl.56.

160. *See* Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 MARQ. L. REV. 477, 479 (2009).

161. *See id.* at 488 & n.72 (citing Brief for the United States at 41, Claiborne v. United States, 551 U.S. 87 (2007) (No. 06-5618), 2007 WL 186287 at *41).

162. *See* Rita v. United States, 551 U.S. 338, 391 (2007) (Souter, J., dissenting) ("What works on appeal determines what works at trial . . . ."); Wright, *supra* note 142, at 1384 ("[A]ppellate judges [should] select certain patterns they notice in trial court decision, and . . . cultivate those sentencing practices at the expense of others.").

163. *See* U.S. SENTENCING COMM'N, *supra* note 159, at tbl.58 (reporting that in sixty-four appeals, eighteen involved § 3553).

164. *See* Gall v. United States, 552 U.S. 38, 63 (2007) (Alito, J., dissenting) (noting that the § 3553(a) factors "are so broad that they impose few real restraints on sentencing judges").

courts may differ in the amount of scrutiny they apply to the variance analysis[165] or may be injecting policy preferences into the calculus.[166]

vi. The Relevance of Advisory Guidelines

The Guidelines retain relevance after *Booker* for several reasons. First, per *Booker*'s express command, sentencing courts must consider the Guidelines range in computing a sentence.[167] The pre-*Booker* case law retains validity with regard to what constitutes a permissible departure, though after *Booker*, a district court can reduce a sentence based on a factor within the broad variance grounds but outside the narrow departure grounds.[168] Courts continue to cite cases from before *Booker*, applying the logic of decisions that in turn rely on the formerly mandatory scheme, thereby keeping that reasoning relevant.[169] Indeed, excluding government-sponsored downward departures, judges still sentence within the Guidelines range nearly seventy-five percent of the time.[170]

Second, *Booker*'s internal inconsistencies render its guidance less than clear.[171] One scholar characterizes the *Booker* problem as creating a "fundamental tension between promoting adherence to the Guidelines without running afoul of the Sixth Amendment."[172] For a court unsure of *Booker*'s mandate, it is safe to sentence within the Guidelines[173] because

165. *Compare* United States v. Wills, 476 F.3d 103, 107–08 (2d Cir. 2007) (finding that deportation does not reduce the need for a sentence to incapacitate), *with* United States v. Ngatia, 477 F.3d 496, 502 (7th Cir. 2007) (finding that deportation does reduce the need for a sentence to incapacitate).

166. *See* Lynch, *supra* note 142, at 5 (arguing that appellate review should create a common law of sentencing that articulates what is "sensible" policy); Wright, *supra* note 142, at 1383 ("Appellate courts take the lead in common-law development. They identify trends, extrapolate general principles from the patterns they discern in particular cases, and require courts in their jurisdiction to adopt the chosen principles over other (perhaps equally sensible) competing principles.").

167. United States v. Booker, 543 U.S. 220, 245–46 (2005) (Breyer, J., delivering the opinion of the Court in part) (remedying the Guidelines' constitutional problem by "requir[ing] a sentencing court to consider Guidelines ranges" and "permit[ing] the court to tailor the sentence in light of other statutory concerns as well"); *see also Gall*, 552 U.S. at 49 (stating that "the Guidelines should be the starting point and the initial benchmark," though not the only consideration, in crafting a sentence).

168. *See supra* note 99–100 and accompanying text.

169. *See, e.g.*, United States v. Mendez, 362 F. App'x 484, 488 n.4 (6th Cir. 2010); *Wills*, 476 F.3d at 107; United States v. Arroyo Mojica, 131 F. App'x 80, 82 (9th Cir. 2005).

170. *See* U.S. SENTENCING COMM'N, *supra* note 16, at tbl.1. Excluding the 25.7% of sentences affected by a Government-sponsored downward departure, 54.6% of the remaining 74.3%, or 73.5%, of sentences fell within the Guidelines range. *Id.*

171. *See* John F. Pfaff, *The Future of Appellate Sentencing Review:* Booker *in the States*, 93 MARQ. L. REV. 683, 685 (2009).

172. Hessick, *supra* note 29, at 741.

173. *See* Bibas et al., *supra* note 145, at 1372. As one district judge has pointed out, the Guidelines have been in place for a generation, and thus many federal judges have no frame of reference that does not involve a Guidelines determination of a sentence. *See* Nancy Gertner, Gall, Kimbrough *and Me*, OSJCL AMICI: VIEWS FROM THE FIELD 1, 4 (Jan. 2008), http://moritzlaw.osu.edu/osjcl/blog/Articles_1/Final2-Gertner-edit-1-18-08.pdf.

that sentence may earn particular deference on appeal[174] and is less likely to be reversed.[175] Justice Stevens admitted as much, stating, "I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*."[176]

5. Recent Immigration-Related Updates to the Guidelines

The Guidelines have recognized certain ways that noncitizens' experience in the criminal justice system varies from that of citizens. In addition to sanctioning fast track sentences,[177] the Commission has more recently enacted one amendment and proposed another that would lessen the particular burdens of sentencing on noncitizens.

Moreover, in January 2010, the Commission sought public comments on whether it should directly address alienage consequences in the Guidelines,[178] but did not include any such amendments in its 2010 updates. Many prominent groups have expressed opinions in favor of and opposed to an amendment. For example, the American Civil Liberties Union (ACLU) urged the Commission to adopt the amendment, citing the longer, harsher prison terms that noncitizens serve and the unwarranted disparity that those conditions create.[179] Opponents of an amendment, including the Department of Justice and certain members of Congress, argue that the purpose of the SRA was to base criminal punishment on the crime committed and the offender's criminal history, not personal

174. *See* Rita v. United States, 551 U.S. 338, 341 (2007); *see also* United States v. Sedore, 512 F.3d 819, 829 (6th Cir. 2008) (Merritt, J., dissenting) (referring to sentencing courts' post-*Booker*, effectively mandatory treatment of the Guidelines as "guidelinitis").

175. *See Rita*, 551 U.S. at 354 (acknowledging the defendant's argument that a non-binding appellate presumption of reasonableness for within-Guidelines sentences may encourage judges to sentence within the Guidelines); Bibas et al., *supra* note 145, at 1387 (noting that in circuits where the appellate court has adopted a *Rita* reasonableness presumption, the Guidelines provide a "safe harbor[]"); Alexandra A.E. Shapiro & Nathan H. Seltzer, *Guidelines or Higher: NYCDL's Study of Reasonableness Review Reveals the Courts of Appeals' Aversion to Parsimony*, 19 FED. SENT'G REP. 177, 180 (2007) (finding that between *Booker* and *Rita*, only one in over 1,500 within-Guidelines sentences was reversed on substantive grounds).

176. *See Rita*, 551 U.S. at 366 (Stevens, J., concurring).

177. *See supra* note 91 and accompanying text.

178. *See supra* note 19 and accompanying text.

179. *See* Murphy Letter, *supra* note 18, at 2.

characteristics.[180] However, proponents of an amendment note that § 3553 already requires consideration of the offender's personal characteristics.[181]

i. Departure for Cultural Assimilation

Under the 2010 Guidelines, noncitizens convicted of illegal reentry have the opportunity for additional lenience in sentencing.[182] Section 2L1.2, under which those convicted of illegal entry are sentenced, contains a new application note that provides for downward departures for defendants who have significant ties to the United States.[183] The application note states that a departure may properly be based on an offender's family and cultural ties within the United States if that offender has lived in the United States since childhood.[184] The departure is explicitly only available to those defendants whose "cultural ties provided the primary motivation for the defendant's illegal reentry."[185] Thus, on its face, it is unavailable to defendants charged with nonimmigration crimes or to legal residents.

ii. Departure for Stipulated Order of Deportation

The Commission has proposed an amendment which would sanction a downward departure for a defendant who stipulates to an order of deportation.[186] This proposal has not yet been adopted, and is being considered for inclusion in the Commission's May 2011 updates.[187] Immigration and Customs Enforcement (ICE) has indicated its support for this provision, arguing that it promotes judicial efficiency and fairness to offenders, particularly those charged with nonimmigration offenses.[188] On the other hand, opposition to the proposal is premised on a concern that

180. *See* Letter from Lamar Smith, Ranking Member, House Comm. on the Judiciary, et al., to William K. Sessions, Chair, U.S. Sentencing Comm'n 1 (Mar. 22, 2010), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/HouseSenate%20Letter.pdf (noting the "strong opposition" of two Senators and seven Congressmen to Guidelines amendments that consider offender specific characteristics as inconsistent with Congressional intent in passing the SRA); Transcript of Public Hearing at 24, U.S. Sentencing Comm'n (Mar. 17, 2010), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Hearing_Transcript.pdf (statement of Tristram J. Coffin, U.S. Attorney, Dist. of Vt.) (stating that further consideration of offender specific characteristics would "jeopardize uniformity").

181. *See* Letter from Julie Stewart & Mary Price, Families Against Mandatory Minimums, to William K. Sessions, Chair, U.S. Sentencing Comm'n 10 (Mar. 22, 2010), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/FAMMComments%203-22-10.pdf; *see also* 18 U.S.C. § 3553(a)(1) (2006).

182. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.8 (2010).

183. *Id.*

184. *Id.*

185. *Id.*

186. *See* Notice of Final Priorities, 75 Fed. Reg. 54,699, 54,700 (Sept. 8, 2010).

187. *See id.*

188. Transcript of Public Hearing at 18–19, U.S. Sentencing Comm'n (Jan. 20, 2010), *available at* http://ftp.ussc.gov/AGENDAS/20100120/Public_Hearing_Transcript.pdf (statement of John T. Morton, Dir., U.S. Immigration & Customs Enforcement).

defendants will be hurried into consenting to removal and waiving legitimate defenses.[189]

B. Immigration Law and the Criminal Alien

This section briefly describes modern immigration law, focusing on how criminal convictions affect noncitizens. It also considers the tensions inherent in the doctrine that immigration law is civil and thus so is deportation, a formalism that results in a lack of full Sixth Amendment rights in removal proceedings,[190] and treatment of immigration consequences as "collateral" and thus not relevant to sentencing decisions.[191]

1. Congress's Broad Removal Power

Congress has plenary authority to determine who may enter the United States and who may not.[192] In other words, under the traditional plenary power doctrine, legislative and executive decisions about immigration are largely insulated from judicial review.[193] Modern immigration policy generally follows two primary goals in deciding whom to admit: uniting family members and bringing qualified workers into the country.[194] The Department of Homeland Security (DHS) has made the removal of noncitizens convicted of crimes a top priority in its enforcement regime.[195]

For the purposes of this Note, the terms "noncitizen" and "alien" are synonymous. An alien is "any person not a citizen or national of the United

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189. *See id.* at 36–37 (statement of John T. Morton, discussing the point of view of the immigration bar).

190. *See infra* note 223 and accompanying text.

191. *See* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124 (2009).

192. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952) ("The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose. . . . [The Government's ability to deport noncitizens is] a power inherent in every sovereign state."); Mahler v. Eby, 264 U.S. 32, 39 (1924) ("The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments."); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 6 (1984). *But see* 1 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 1.03[2][a], 1.03[3][b] (2010) (noting that the plenary power doctrine has been limited but not overruled).

193. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

194. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1730 (2009) (citing ALEXANDER ALEINIKOFF ET AL., IMMIGRATION & CITIZENSHIP: PROCESS & POLICY 297 (6th ed. 2008)); *see also* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.) (setting forth a preference system for immigration admissions with the categories "Family-Sponsored Immigrants," "Employment-Based Immigrants," and a new category of "Diversity Immigrants").

195. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees 1–2 (June 30, 2010), *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf. The memorandum also suggests that it might be appropriate to exercise prosecutorial discretion when dealing with lawful permanent residents, among others. *Id.* at 4.

States."[196] Any noncitizen is subject to immigration laws and as such is potentially subject to deportation.[197] Congress has established many categories of legal aliens, only a few of which will be mentioned here. A lawful permanent resident (LPR) is a person who has been "lawfully accorded the privilege of residing permanently in the United States as an immigrant."[198] LPRs are more casually known as green card holders.[199] LPRs fall within the legal category of "immigrant" because of their intent to reside permanently in the United States.[200] Aliens also consist of nonimmigrant visa holders, including foreign students, and non-visa holders such as tourists from certain countries.[201] Asylees[202] and refugees[203] are noncitizens granted legal status based on a fear of persecution. Temporary protected status may be granted to groups of individuals, such as hurricane victims.[204]

Those who enter the United States illegally, or who entered legally but have otherwise violated the terms of their admission, for example by overstaying a visa, are illegal immigrants.[205]

The Immigration and Nationality Act[206] sets forth six categories of deportable offenses.[207] The only category relevant to this Note is deportability for criminal convictions.[208]

Several types of criminal convictions render a noncitizen removable. Primary among those are convictions for an "aggravated felony."[209] Many

196. 8 U.S.C. § 1101(a)(3) (2006); *see also* BLACK'S LAW DICTIONARY 84 (9th ed. 2009), defining an alien as "[a] person who resides within the borders of a country but is not a citizen or subject of that country." The terms "immigrant" and "nonimmigrant" further distinguish aliens in that an immigrant intends to stay in the United States permanently, whereas a nonimmigrant does not intend to stay. *See* 8 U.S.C. § 1101(a)(15); BLACK'S LAW DICTIONARY 817.

197. *See* 8 U.S.C. § 1227(a) ("Any alien . . . shall . . . be removed if the alien is within one or more of the following classes of deportable aliens . . . ."); RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 207 (2d ed. 2009).

198. 8 U.S.C. § 1101(a)(20).

199. MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 2 (3d ed. 2008).

200. *See supra* note 196. See 8 U.S.C. § 1101(a)(15) for the categories of exceptions to the definition of immigrant.

201. KRAMER, *supra* note 199, at 3–4.

202. *See* 8 U.S.C. § 1158.

203. *See id.* § 1157.

204. *Id.* § 1254a; KRAMER, *supra* note 199, at 6.

205. *See* KRAMER, *supra* note 199, at 8; *infra* note 208.

206. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537).

207. 8 U.S.C. § 1227(a)(1)–(6); AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 7:3 (4th ed. 2010). Before the legal reforms in 1996, *see infra* note 224, the process by which a person was removed from the United States was called "deportation"; since 1996, the process is called "removal." *See* 5 GORDON, MAILMAN & YALE-LOEHR, *supra* note 192, § 64.01[1].

208. 8 U.S.C. § 1227(a)(2). The other classes of deportable aliens are those who: (1) entered the country illegally or who entered legally but overstayed; (2) have "fail[ed] to register and falsif[ied] documents;" (3) are removable on "security and related grounds;" (4) become a "public charge" within five years of entry; or (5) vote illegally in any election. *Id.* § 1227.

aggravated felonies are violent crimes,[210] although "aggravated felony" is a term of art that Congress has defined to include a growing set of offenses.[211] In addition, any alien convicted of a controlled substance offense[212] or of certain firearm offenses[213] is deportable. Convictions for crimes of moral turpitude also form the basis for deportation.[214] Crimes of moral turpitude may include arson, blackmail, embezzlement, forgery, and theft.[215] Those convicted of one aggravated felony or more than one crime involving moral turpitude are ineligible for relief from removal.[216]

2. The Civil Underpinnings of Removal Policy

Traditional U.S. jurisprudence treats deportation as a basic correction of a wrong[217] and embraces "the formalism that deportation of any type is *never* punishment for constitutional purposes."[218] Courts have adhered to the characterization of deportation as an administrative, non-criminal procedure.[219] Nevertheless, the Supreme Court has stated on multiple

209. The term "aggravated felony" includes crimes as diverse as murder, firearms trafficking, money laundering, and perjury. *See* 8 U.S.C. § 1101(a)(43)(A), (C), (D), (S). The term is criticized as being both malleable and a misnomer, applying to offenses not generally considered aggravated or felonious. *See* Stumpf, *supra* note 194, at 1692–93, 1723.

210. FRAGOMEN & BELL, supra note 207, § 7:3.2, at 7-107.

211. *See* BOSWELL, *supra* note 197, at 16–17.

212. 8 U.S.C. § 1227(a)(2)(B)(i).

213. *Id.* § 1227(a)(2)(C).

214. *Id.* § 1227(a)(2)(A)(i)–(ii). One scholar notes that a crime involving moral turpitude "defies any absolute definition, but has been described as a crime that has a mens rea requirement and involves conduct that is inherently base or vile, and contrary to the accepted rules of morality—essentially a crime that is per se or intrinsically wrong." BOSWELL, *supra* note 197, at 50. On the other hand, the Board of Immigration Appeals has defined crimes of moral turpitude as involving "a conscious disregard of a substantial and unjustifiable risk to the life or safety of others." Franklin v. INS, 72 F.3d 571, 572 (8th Cir. 1995) (citing cases). The State Department has noted that a crime of moral turpitude often involves elements of "fraud," "larceny," and "intent to harm persons or things." U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL 9 FAM 40.21(a) N2.2 (2010), *available at* http://www.state.gov/documents/organization/86942.pdf.

215. *See* U.S. DEP'T OF STATE, *supra* note 214, at N2.3-1(b).

216. 8 U.S.C. § 1229b(a)(3) & (b)(1)(C) (rendering an alien convicted of an aggravated felony ineligible for cancellation of removal); *see* FRAGOMEN & BELL, *supra* note 207, § 7:3.2, at 7-115.

217. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend."); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Garcia v. Holder, 320 F. App'x 288, 291 (5th Cir. 2009); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1894–95 (2000) (stating that "our courts have long held that deportation proceedings are civil rather than criminal, and that deportation, however harsh it may be in practice, is not punishment," and criticizing that doctrine as both tautological and counterintuitive).

218. Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 779 (2000).

219. *Harisiades*, 342 U.S. at 594.

occasions that "deportation may result in the loss 'of all that makes life worth living.'"[220] Thus, though formalism persists, it engenders scholarly[221] and judicial[222] resistance. Nonetheless, removal proceedings are still treated as civil rather than criminal matters, and accordingly, the protections of the Sixth Amendment do not all attach.[223]

Congress enacted significant reforms to immigration law in passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[224] IIRIRA added new crimes to Congress's list of aggravated felonies and removed various avenues of relief for noncitizen convicts facing deportation.[225] Reacting to this expansion, and noting that the post-1996 scheme makes the deportation of many noncitizen offenders "practically inevitable," the Supreme Court in *Padilla v. Kentucky*[226] opined that "[t]hese changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[227] Moreover, the *Padilla* Court's holding—that a noncitizen defendant can claim ineffective assistance of counsel where his attorney did not warn him that his conviction would likely lead to deportation[228]—rejected the Supreme Court of Kentucky's view that deportation was a "collateral" consequence and that "those

220. Bridges v. Wixon, 326 U.S. 135, 147 (1945) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

221. *See, e.g.*, Kanstroom, *supra* note 218, at 780–81 ("[E]ach ostensibly civil or collateral consequence should be considered on the merits to determine whether—under the circumstances in which it is imposed—it is punishment or not. . . . [because deportation] is uniquely punitive . . . . The deportation of long-term, legal permanent residents for post-entry conduct is imposed as a direct consequence of a prior 'bad' act."); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 306 (2000) (mocking the traditional view of deportation as "nothing more than a polite mechanism for sending home individuals who do not quite live up to our standards and are not fit to be members of our community").

222. *See, e.g.*, Scheidemann v. INS, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring) (arguing that for purposes of the Ex Post Facto clause, "[t]he legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality"); Beharry v. Reno, 183 F. Supp. 2d 584, 590 (E.D.N.Y. 2002) (stating that "[i]t defies common experience to characterize deportation of an alien such as petitioner as anything other than punishment for his crimes" and noting that Socrates chose death over exile), *rev'd sub nom*, Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

223. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984); Pauw, *supra* note 221, at 309 (noting that in deportation proceedings, a noncitizen does not have the right to a jury trial, the right to assistance of counsel, or the benefit of the exclusionary rule for illegally seized evidence).

224. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of Titles 8 and 18 of the U.S. Code); *see also* 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 192, § 2.04[14][c] (calling the new law "a major reconfiguring").

225. BOSWELL, *supra* note 197, at 16–17.

226. 130 S. Ct. 1473 (2010).

227. *Id.* at 1480.

228. *Id.* at 1483.

matters [were] not within the sentencing authority of the state trial court."[229]

C. Sentencing Noncitizens: Three Contours

Noncitizen defendants challenge the effect of alienage on their sentences in three primary ways. First, noncitizens convicted of particular crimes are very likely to be deported.[230] As detailed in Part I.B, any noncitizen convicted of one aggravated felony or controlled substance offense, or of two crimes of moral turpitude, is ineligible for relief from deportation, and thus faces near certain removal from the country.[231]

Second, a noncitizen's time incarcerated may be more burdensome than that of an otherwise identical citizen because the Bureau of Prison (BOP) blocks noncitizens' access to two types of benefits. The case law refers to this ineligibility generally as imposing harsher or more severe conditions of confinement.[232] First, noncitizens are automatically ineligible to serve their terms in a minimum security facility, the lowest security designation for federal prisons,[233] because BOP policy mandates placement of noncitizens in low security facilities or higher.[234] Congress has directed that the BOP "shall, to the extent practicable" place a prisoner in a facility that enables community readjustment, such as a halfway house, for up to one year at the end of his term.[235] However, because inmates with ICE detainers are generally ineligible for minimum security facilities, they are ineligible for this more lenient end-of-sentence confinement.[236]

Relatedly, noncitizens may serve longer actual prison terms than otherwise identical citizens. Those who undergo drug treatment in prison may be entitled to up to one year of early release for successful completion;[237] however BOP policy renders inmates with ICE detainers

229. *Id.* at 1481 ("[W]e find it 'most difficult' to divorce the penalty from the conviction in the deportation context.").

230. *See supra* notes 195, 209–16 and accompanying text. The Department of Homeland Security (DHS) cites a lack of resources as the primary reason that it is unable to remove each and every convicted, deportable alien. *See* DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., DETENTION AND REMOVAL OF ILLEGAL ALIENS OIG-06-33, at 14 (2006).

231. *See supra* notes 196–97, 206–16 and accompanying text.

232. *See, e.g.*, United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997); United States v. Smith, 27 F.3d 649, 651 (D.C. Cir. 1994).

233. "Minimum security institutions, also known as Federal Prison Camps (FPCs), have dormitory housing, a relatively low staff-to-inmate ratio, and limited or no perimeter fencing. These institutions are work- and program-oriented . . . ." *Prison Types & General Information*, U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, http://www.bop.gov/locations/institutions/index.jsp (last visited Mar. 23, 2011). On the other hand, low security facilities "have double-fenced perimeters, mostly dormitory or cubicle housing, and strong work and program components. The staff-to-inmate ratio in these institutions is higher than in minimum security facilities." *Id.*

234. U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. P5100.08, INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION ch. 5, at 9 (2006).

235. 18 U.S.C. § 3624(c)(1) (Supp. 2010).

236. *See Smith*, 27 F.3d at 651 & n.2.

237. 18 U.S.C. § 3621(e)(2)(B) (2006); 28 C.F.R. § 550.54(a)(1)(iv) (2010).

ineligible for early release.[238] Several other categories of inmates are similarly disqualified, including inmates with convictions for homicide, rape, arson, or kidnapping; inmates who had previously been released under the treatment program; and contractual boarders.[239]

Third, Congress has granted the U.S. Attorney General the authority to detain a convicted noncitizen at the end of his term of imprisonment.[240] Formerly, ICE did not begin deportation proceedings until the conclusion of a deportable alien's prison term, but more recently, ICE has made efforts to begin proceedings earlier and decrease the time noncitizens spend in immigration detention following the end of their sentences.[241] These efforts have helped, but have not eliminated the likelihood that a deportable alien may spend several extra months functionally imprisoned, in addition to the term to which he was sentenced.[242] The BOP prohibits crediting immigration detention toward a prison sentence,[243] but with an easy analogy to creditable time served,[244] courts are left to consider whether the sentence imposed should account for that time.

The courts' treatment of the three main ways that alienage impacts sentences has created a circuit split, as courts have disagreed in their

238. 28 C.F.R. § 550.55(b)(1); *see also* Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally*, 21 FED. SENT'G REP. 174, 176 (2009) (arguing that this program should be expanded to allow noncitizens to participate).

239. 28 C.F.R. § 550.55(b)(2)–(7). Contractual boarders include, for example, state inmates housed in federal prison. *Id.* § 550.55(b)(3).

240. 8 U.S.C. § 1226(c)(1) (2006) states: "The Attorney General shall take into custody any alien who . . . is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) [multiple criminal convictions for crimes involving moral turpitude], (A)(iii) [aggravated felonies], (B) [controlled substances], (C) [certain firearm offenses], or (D) [miscellaneous crimes] of this title . . . ." The statute provides a narrow exception to mandatory confinement where release is necessary to protect a witness in an investigation. *See id.* § 1226(c)(2). The Supreme Court upheld the constitutionality of detaining deportable aliens in *Demore v. Kim*, 538 U.S. 510, 513 (2003).

241. *See* Martin Arms, Comment, *Judicial Deportation Under 18 USC § 3583(d): A Partial Solution to Immigration Woes?*, 64 U. CHI. L. REV. 653, 657 & n.26 (1997).

242. *See id.*; *see also* Transcript of Public Hearing, *supra* note 188, at 33–34 (statement of John T. Morton, Asst. Sec'y of Homeland Sec. for ICE) (noting that a "large number" of deportable federal inmates spend between forty days to a few months in civil detention pending deportation). While immigration detention is technically a civil process, the conditions of detention centers often mirror those of prisons. *See* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43, 47 (2010), http://www.columbialawreview.org/assets/sidebar/volume/110/42_Anil_Kalhan.pdf (discussing the severe conditions of immigration detention and the use of county jails to hold detainees).

243. *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5880.28, CHANGE NOTICE SENTENCE COMPUTATION MANUAL 1-15A (1997); Demleitner, *supra* note 238, at 174.

244. 18 U.S.C. § 3585(b) (2006) (giving a person credit toward completion of a sentence for time served prior to the beginning of the sentence); STEPHEN R. SADY & LYNN DEFFEBACH, THE SENTENCING COMMISSION, THE BUREAU OF PRISONS, AND THE NEED FOR FULL IMPLEMENTATION OF EXISTING AMELIORATIVE STATUTES TO ADDRESS UNWARRANTED AND UNAUTHORIZED OVER-INCARCERATION 25–26 (2008), *available at* http://or.fd.org/symp2.final%20for%20pdf.pdf (arguing that the BOP's rule prohibiting credit for time spent in immigration detention lacks any "conceivable justification").

interpretations of how these factors interact with aspects of § 3553 and the Guidelines' provisions for departure.

II. CONSIDERING THE CONSEQUENCES OF ALIENAGE IN SENTENCING

The conflict over considering deportability in sentencing revolves around the three issues outlined in Part I.C. First, courts differ over whether the deportation itself is, in some circumstances, so onerous that the defendant deserves a discounted sentence.[245] Second, given certain legislative and administrative policies that govern the rights of incarcerated noncitizens compared to citizens, judges vary as to whether the resulting harsher conditions of confinement merit a downward departure for the noncitizen defendant.[246] Third, because a noncitizen convict may face additional time in immigration detention following a prison term, a few courts have queried whether this increased detention warrants an offset.[247]

This circuit split first emerged in the mid-1990s, under the early period of the mandatory Guidelines scheme. In 1993, the Second Circuit decided *United States v. Restrepo*,[248] holding that while departing downward in consideration of alienage was not barred per se, the factors that the defendant presented—likely deportation, more severe prison conditions, and additional immigration detention—did not suffice to justify a departure.[249] The *Restrepo* court thus left very little room for consideration of alienage consequences because it rejected each of the factors that defendants typically raise.[250] Several circuits explicitly adopted *Restrepo*'s logic.[251] The D.C. Circuit, however, diverged from the *Restrepo* line of cases. In *United States v. Smith*,[252] the court held that where a defendant faces more onerous terms of confinement due strictly to his alienage, that

245. *See infra* Parts II.A.1, II.B.1.
246. *See infra* Parts II.A.2, II.B.2.
247. *See infra* Parts II.A.3, II.B.3.
248. 999 F.2d 640 (2d Cir. 1993).
249. *Id.* at 643–47.
250. *See* United States v. Mendoza, 576 F.3d 711, 722 (7th Cir. 2009) (noting that defendant's deportability and resultant conditions of confinement were "nothing other than [] stock argument[s] that [are] routinely, and increasingly, made to the district courts"); *Restrepo*, 999 F.2d at 647 (noting that a "large number" of federal defendants are subject to deportation); *see also* Murphy Letter, *supra* note 18, at 1–5 (describing the differences between citizens' and noncitizens' imprisonment under the categories of "Differential Conditions of Confinement and Prison Time Served" and "Severe Immigration Consequences"); *cf.* United States v. Simalavong, 924 F. Supp. 610, 613 (D. Vt. 1995) (finding defendant's circumstances so atypical as to fall into *Restrepo*'s exception); *infra* notes 353–54 and accompanying text.
251. *See* United States v. Veloza, 83 F.3d 380, 382 (11th Cir. 1996); United States v. Nnanna, 7 F.3d 420, 422 (5th Cir. 1993); United States v. Mendoza-Lopez, 7 F.3d 1483, 1487 (10th Cir. 1993).
252. 27 F.3d 649 (D.C. Cir. 1994).

increase in severity may be offset by a downward departure.[253] Essentially, *Smith* found sufficient the factors that *Restrepo* rejected.[254]

After 1996, some courts argued that *Koon* obviated the split, as it recognized broad discretion for judges to depart downward.[255] Thus, *Booker*'s even wider grant of discretion could have eradicated the issue from the discourse entirely;[256] however, that has not been the case, as the following sections elucidate.[257]

Since *Booker* made the Guidelines advisory in 2005,[258] sentencing courts have grappled with the proper application of the Guidelines and other sentencing factors.[259] Following *Booker*, departures remain available for courts that find that the consequences of alienage are mitigating factors taking a case out of the heartland.[260] Additionally, sentencing judges often see likely future deportation, and its attendant consequences for the noncitizen prisoner, as accomplishing some of § 3553's goals, and thus incarceration is not the only source of punishment,[261] incapacitation,[262] and deterrence.[263] Meanwhile, appellate courts review application of the § 3553 factors for reasonableness and—either explicitly or implicitly—must determine the appropriate level of scrutiny applicable to non-Guidelines sentences.[264]

A. Sentencing Courts Cannot Consider the Effects of Noncitizenship

The Guidelines do not indicate whether alienage and deportability should play a role in sentencing, and thus since *Booker*, courts have addressed

253. *Id.* at 650.

254. *See id.* at 654–55; *see also* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 327 & n.253 (1997) (noting that *Smith* accepted the "identical argument" that *Restrepo* rejected).

255. *See, e.g.*, United States v. Garay, 235 F.3d 230, 233 & n.18 (5th Cir. 2000) (noting abrogation of *Nnanna* in the wake of *Koon*); United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997); United States v. Charry Cubillos, 91 F.3d 1342, 1344 (9th Cir. 1996); Jason Bent, Note, *Sentencing Equality for Deportable Aliens: Departures from the Sentencing Guidelines on the Basis of Alienage*, 98 MICH. L. REV. 1320, 1338 (2000); *see also* Koon v. United States, 518 U.S. 81, 106–07 (1996); *supra* notes 80–85 and accompanying text.

256. *See* United States v. Gomez, 431 F.3d 818, 825 (D.C. Cir. 2005) ("If *Booker*'s rendering the Guidelines discretionary means anything, it must give a district judge greater latitude on these issues [of individual circumstances or hardship] than did *Koon*.").

257. *See infra* Part II.A–B.

258. *See* United States v. Booker, 543 U.S. 220, 245 (2005) (Breyer, J., delivering the opinion of the Court in part); *supra* notes 96–97 and accompanying text.

259. *See supra* note 111 and accompanying text.

260. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2010); *supra* notes 67, 168 and accompanying text.

261. *See* 18 U.S.C. § 3553(a)(2)(A) (2006); United States v. Wills, 476 F.3d 103, 107 (2d Cir. 2007).

262. *See* 18 U.S.C. § 3553(a)(2)(C); United States v. Ngatia, 477 F.3d 496, 502 (7th Cir. 2007).

263. *See* 18 U.S.C. § 3553(a)(2)(B); *Wills*, 476 F.3d at 108.

264. *See* United States v. Booker, 543 U.S. 220, 313 (2005) (Scalia, J., dissenting in part) (noting the breadth of plausible interpretations of "unreasonableness" review, from assuring merely procedural compliance to maintaining effectively mandatory Guidelines); *supra* note 149 and accompanying text.

whether alienage consequences moot certain sentencing goals.[265] Where courts have found such arguments unpersuasive, their common underlying themes include notions of inequality where a reduction in sentence is premised on alienage alone,[266] and a rejection of applying a mitigating factor to such a large swath of federal offenders.[267]

1. Deportability Does Not Justify a Shorter Sentence

In *United States v. Wills*,[268] the Second Circuit held that deportability is not, on its face, an appropriate basis for a sentence reduction.[269] In *Wills*, the U.S. District Court for the Northern District of New York departed downward on the grounds that first, the defendant faced the additional punishment of deportation and second, that under § 3553(a), the defendant posed no threat to the public because he would be deported.[270] The Second Circuit reversed both of these judgments.[271]

Addressing the district court's assertion that deportation constituted additional punishment, the *Wills* court said little to justify its holding, and instead, relied on its 1993 holding in *Restrepo*, affirming it in light of *Booker*.[272] The *Restrepo* court had reasoned that deportability was likely considered by the Commission, given the number of noncitizens in the federal criminal system.[273] Therefore, deportability would fall within the heartland as an inappropriate basis for departure.[274] In addition, the *Restrepo* court stated that a downward departure is not "rationally . . . capable of remedying"[275] the problem caused by deportation for two reasons. First, according to the court, departure does not ease the burdens of deportation, but only "advances the day when deportation will occur."[276] A downward departure would thus "exacerbate rather than remedy [deportation's] harshness."[277] Second, the *Restrepo* court was concerned that a defendant who moves for a downward departure appears to prefer deportation to additional time in prison, and cannot logically argue that deportation is the worse of the two alternatives.[278]

After affirming the *Restrepo* departure logic, the *Wills* court evaluated the § 3553(a) factors to determine whether deportability merited a variance.[279] First, it addressed the direct issue raised in the lower court:

265. *See supra* notes 261–63 and accompanying text.
266. *See infra* notes 290, 303–08 and accompanying text.
267. *See infra* notes 273, 306 and accompanying text.
268. 476 F.3d 103 (2d Cir. 2007).
269. *Id.* at 107.
270. *Id.* at 106 (discussing the district court's disposition).
271. *Id.* at 107–09.
272. *Id.* at 107 (citing United States v. Restrepo, 999 F.2d 640, 647 (2d Cir. 1993)).
273. *See Restrepo*, 999 F.2d at 647; *supra* note 16 and accompanying text.
274. *Wills*, 476 F.3d at 108.
275. *Restrepo*, 999 F.2d at 647.
276. *Id.*
277. *Id.*
278. *See id.*
279. *Wills*, 476 F.3d at 107–08.

whether deportation itself incapacitated the offender and protected the public, thereby reducing the need for the sentence to do so.[280] The court determined that a deported offender remained capable of causing harm within the United States, be it through illegal reentry, border violence, or drug trafficking.[281] Thus, the court held that without some affirmative, individualized basis to believe that the public needed no further protection from Wills, his deportability was not a sufficient basis to decrease his sentence.[282]

Next, the court considered deportability's interaction with another of Congress's sentencing goals: deterrence.[283] Relying again on *Restrepo*, the court reasoned that because some offenders may prefer deportation over incarceration, the deterrent character of imprisonment would be weakened with a downward variance for deportability.[284]

The Second Circuit's rather exacting review of the district court's decision seems to stem from two doctrinal bases. First is the precept from *Booker*'s remedial opinion that the advisory Guidelines scheme should reintroduce some degree of individualization into sentencing.[285] The court noted that deportability and immigration status are not individual characteristics; rather, they are shared by a significant percentage of offenders.[286] The second is an implicit notion that reasonableness review under *Booker* requires the application of a certain amount of scrutiny to the district court's treatment of the § 3553 factors.[287]

In *United States v. Castro-Rivas*,[288] the U.S. Court of Appeals for the Tenth Circuit relied on its pre-*Booker* law on Guidelines departures, and adopted the Second Circuit's reasoning from *Wills*, to find that considering deportability among the § 3553(a) factors was legal error.[289] In addition, the *Castro-Rivas* court expressed that it could not support an outcome where disparate sentences turned on citizenship status alone.[290]

The U.S. Court of Appeals for the Ninth Circuit cited procedural unreasonableness—rather than the substantive unreasonableness cited by *Wills*—to invalidate consideration of alienage consequences in *United*

280. *Id.* (accepting, with some apparent skepticism, the assumption that the "public" referred to in § 3553 was only the American public); *see also* 18 U.S.C. § 3553(a)(2)(C) (2006).

281. *Wills*, 476 F.3d at 108.

282. *Id.* at 111.

283. *See* 18 U.S.C. § 3553(a)(2)(B); *Wills*, 476 F.3d at 108.

284. *Wills*, 476 F.3d at 108.

285. *See id.*; *see also* United States v. Booker, 543 U.S. 220, 264–65 (2005) (Breyer, J., delivering the opinion of the Court in part).

286. *See Wills*, 476 F.3d at 109. In *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc), the U.S. Court of Appeals for the Second Circuit limited this part of the *Wills* reasoning. *See id.* at 191. Relying on *Gall* and *Kimbrough*, the *Cavera* court noted that district courts may permissibly rely on categorizations that apply to classes of offenders rather than to individuals. *See id.*

287. *See Wills*, 476 F.3d at 105.

288. 254 F. App'x 742 (10th Cir. 2007).

289. *Id.* at 750.

290. *Id.* at 752.

States v. Arroyo Mojica.[291] There, the U.S. District Court for the Eastern District of Washington had departed downward because the Guidelines did not account for removal's extraordinary hardship on a person who had spent his entire life in the United States.[292] The Ninth Circuit reversed. Relying on pre-*Booker* case law, it held that deportability was a prohibited ground for departure where "the possibility of deportation does not speak to the offender's character, culpability or history nor to the seriousness of the offense."[293] Finding that the sentencing court did not properly "take account" of the Guidelines as commanded by *Booker*, the court found procedural error and remanded for resentencing.[294]

2. Courts Cannot Consider More Severe Conditions of Confinement

Circuit courts have relied on equality rationales and separation of power arguments in holding that it is inappropriate to reduce a sentence to account for more severe conditions of confinement associated with noncitizenship.[295] For example, in *United States v. Telles-Milton*,[296] the U.S. Court of Appeals for the Eleventh Circuit disagreed with the defendant's contention that the sentencing court erred by failing to recognize its authority to decrease his sentence to account for the conditions of confinement he would face due to his noncitizen status.[297] The *Telles-Milton* court affirmed the sentence in reliance on its pre-*Booker* holding that ineligibility for placement in a halfway house cannot justify a downward departure.[298] The precedent cited, *United States v. Veloza*,[299] held that the defendant was not entitled to a downward departure to account for harsher conditions of confinement.[300] *Veloza*, in turn, had relied on *Restrepo*'s rationale that a court's attempt to sidestep BOP policy would impinge upon legislative discretion.[301]

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291. 131 F. App'x 80, 81 (9th Cir. 2005). *Arroyo Mojica* was decided two months after and indeed relied upon the Supreme Court's decision in *Booker*. *See id.*

292. *Id.* at 82 (discussing the district court's decision).

293. *Id.*

294. *Id.* at 83 (citing United States v. Booker, 543 U.S. 220, 259 (2005) (Breyer, J., delivering the opinion of the Court in part)).

295. *See infra* notes 301, 307 and accompanying text.

296. 347 F. App'x 522 (11th Cir. 2009) (per curiam).

297. *Id.* at 523.

298. *Id.* at 525. Admittedly, the posture of *Telles-Milton*—where the district judge sentenced within the Guidelines range and the defendant appealed his sentence's reasonableness—may have produced a different outcome than if the district judge had varied and the government appealed. *See supra* note 175. The court nonetheless reiterated in clear terms in dicta that the sentencing consequences of alienage do not form the basis for a variance. *Telles-Milton*, 347 F. App'x at 525.

299. 83 F.3d 380 (11th Cir. 1996).

300. *Id.* at 382.

301. *See id.*; United States v. Restrepo, 999 F.2d 640, 645 (2d Cir. 1993). The Second Circuit has similarly reaffirmed this portion of the *Restrepo* holding under the advisory Guidelines regime. *See* United States v. Duque, 256 F. App'x 436, 438 (2d Cir. 2007); *see also* United States v. Macedo, 406 F.3d 778, 794 (7th Cir. 2005) ("The government is correct that the district court based its decision on the BOP's policy which places alien prisoners in certain facilities."). Notably, in *Macedo*, the court relied on *Booker* with regard to judicial fact finding, *see id.* at 787, but conducted de novo review in reversing the district court's

Likewise, in *United States v. Babul*,[302] the Seventh Circuit rejected the notion of an "alienage discount" for those who are imprisoned in the United States voluntarily.[303] There, the court relied on the Strasbourg Convention,[304] which allows noncitizen prisoners to be transferred to prisons in their country of citizenship, where those prisoners would get the benefit of any programs designed to reacclimate citizens.[305] The Seventh Circuit has referred to similar requests for departures as "stock argument[s]" that could be made by every deportable alien,[306] and as "discrimination in reverse."[307] Though not explicitly stated, it seems that the Seventh Circuit's decisions have been motivated by a belief that the BOP's regulatory power can properly impact a noncitizen's sentence because the fact of noncitizenship makes the disparity a warranted one, therefore posing no § 3553(a)(6) problem.[308]

3. Future Immigration Detention Cannot Be Offset

The likelihood of future immigration detention poses a particular challenge to judges sentencing deportable aliens because it is easily analogized to time served, which is often credited.[309] The U.S. Court of Appeals for the Third Circuit, in *United States v. Arevalo-Caballero*,[310] affirmed a sentencing court's decision not to decrease the defendant's sentence to account for post-incarceration ICE detention.[311] The district court indicated that it would be "folly" to speculate about a future consequence that was not certain to take place.[312] Similarly, the *Restrepo* court held that an offset is inappropriate because ICE detention could take place regardless of the criminal punishment and is not properly considered criminal punishment.[313] The Second Circuit has elsewhere distinguished between past incarceration and speculative future incarceration, holding that

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downward departure for alienage consequences, *see id.* at 794. This highlights the confusion wrought by the *Booker* opinions. *See supra* notes 107–11 and accompanying text.

302. 476 F.3d 498 (7th Cir. 2007).

303. *Id.* at 502.

304. Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2867 (codified at 18 U.S.C. §§ 4100–15).

305. *See Babul*, 476 F.3d at 502.

306. United States v. Mendoza, 576 F.3d 711, 722 (7th Cir. 2009).

307. United States v. Meza-Urtado, 351 F.3d 301, 305 (7th Cir. 2003).

308. *See Mendoza*, 576 F.3d at 722 ("Every deportable alien would be ineligible to participate in certain BOP programs . . . ."); *Meza-Urtado*, 351 F.3d at 305 ("That the Bureau of Prisons (BOP) has certain programs for citizen-prisoners, but not deportable aliens, does not make the aliens' imprisonment substantially more onerous than the guidelines contemplated in fixing the punishment range for the offense of conviction."); *supra* note 106 and accompanying text.

309. *See* United States v. Montez-Gaviria, 163 F.3d 697, 702 (2d Cir. 1998); *supra* note 244 and accompanying text.

310. 365 F. App'x 419 (3d Cir. 2010).

311. *Id.* at 423 (3d Cir. 2010).

312. *See id.* (quoting the district judge).

313. United States v. Restrepo, 999 F.2d 640, 646 (2d Cir. 1993).

potential future incarceration is too uncertain to warrant a downward departure.[314]

B. Sentencing Courts May Consider the Effects of Noncitizenship

Even prior to *Booker*, sentencing judges were often moved by the particularly harsh nature of deportation when applied to certain long-term residents,[315] as well as the inherent unfairness of permitting alienage alone to create objectively more onerous terms of confinement.[316] Under a mandatory Guidelines scheme, courts relied on departure analysis, finding that such consequences took a particular case outside of the heartland to which the Guidelines apply.[317] Since *Booker*, § 3553 variances have provided courts an equally apt basis to account for what they perceived to be undeserved severity.[318]

The U.S. Court of Appeals for the Sixth Circuit has treated *Booker*'s grant of increased discretion as the determining factor in considering alienage consequences. In dicta, the Sixth Circuit pointed out that

> in the post-*Booker* era, the defendant's immigration status could lead a sentencing court to two opposite conclusions, one being that potential deportation and fewer prison opportunities should be a reason for a downward variance. Conversely, the other conclusion could be that a person granted the benefit of entry to the country should be subject to an upward variance for abusing the privilege. In different factual contexts, either approach is within the discretion of the sentencing court.[319]

Recognizing the validity of both sides of the substantive arguments, the court noted that neither position is off limits under *Booker*, so an appellate court could not override the sound judgment of the sentencing court on this issue.[320] In other words, the nature of appellate review—that is, the amount of deference the appellate court accords the decision of the district court—may be determinative of whether consideration of alienage is left to stand.[321]

1. Deportatability May Justify a Shorter Sentence

In *United States v. Ngatia*,[322] the Seventh Circuit relied on a reduced need to incapacitate[323] a deportable alien in affirming a variance from the Guidelines.[324] There, the court found that deportation negated the need for incarceration to perform a function in protecting the public, stating,

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314. *Montez-Gaviria*, 163 F.3d at 702.
315. *See infra* notes 332–34 and accompanying text.
316. *See infra* notes 342, 346–48 and accompanying text.
317. *See infra* notes 332–34, 342, 345, 353–59 and accompanying text.
318. *See infra* note 322–30, 359–61 and accompanying text.
319. United States v. Petrus, 588 F.3d 347, 356 (6th Cir. 2009).
320. *See id.*
321. *See id.*; *supra* note 165 and accompanying text.
322. 477 F.3d 496 (7th Cir. 2007).
323. *See* 18 U.S.C. § 3553(a)(2)(C) (2006).
324. *Ngatia*, 477 F.3d at 502.

"[c]onsidering that it is almost certain that Ngatia will be deported following her release, she will be incapacitated from further drug importation to the United States."[325] The Seventh Circuit also stressed the discretion afforded to sentencing judges and the consequent need for only minimal appellate review.[326] By saying little else on the subject, the Seventh Circuit seemingly gave considerable deference to the district court's analysis of § 3553.

Section 3553(a)'s command to consider a defendant's characteristics similarly provides an avenue for considering alienage consequences.[327] In *United States v. Loaiza-Sanchez*,[328] the sentencing court found that illegal presence was an aggravating factor sufficient to justify sentencing the defendant at a higher point within the Guidelines range.[329] The defendant appealed, and the U.S. Court of Appeals for the Eighth Circuit held that alienage is properly considered as part of the defendant's "history and characteristics."[330]

Both pre- and post-*Booker*, courts have used Guidelines departure analysis to account for alienage consequences.[331] The *Ferreria* court found that loss of family is not adequately accounted for in the Guidelines.[332] The court relied on *United States v. Agu*,[333] a pre-*Restrepo* decision where the sentencing court departed downward for a defendant who, due to his military service, was entitled to become a citizen but never did, and whose imminent separation from his wife and child thus constituted mitigating circumstances warranting a downward departure.[334]

The argument that deportation is punishment is supported by scholarship that maintains that the traditional view of deportation as a civil measure is out of touch with reality and that deportation is a particularly harsh penalty.[335] Moreover, the common instinct that the sheer cost of incarceration[336] justifies shorter terms for deportable aliens because the

325. *Id.*

326. *See id.* at 501–02.

327. *See* 18 U.S.C. § 3553(a)(1) (requiring sentencing courts to consider "the history and characteristics of the defendant").

328. 622 F.3d 939 (8th Cir. 2010).

329. *See id.* at 940 (referring to the district court's decision). The district court did not depart or issue a variance from the Guidelines; rather, it used alienage as a basis for movement within the Guidelines range. *Id.*

330. *Id.* at 942 (quoting 18 U.S.C. § 3553(a)(1) (2006)).

331. *See supra* notes 99, 168 and accompanying text.

332. *See* United States v. Ferreria, 239 F. Supp. 2d 849, 857 (E.D. Wis. 2002).

333. 763 F. Supp. 703 (E.D.N.Y. 1991).

334. *Id.* at 704.

335. *See* Pauw, *supra* note 221, at 306 (calling removal "an extremely cruel punishment").

336. *See* BUREAU OF PRISONS, FEDERAL PRISON SYSTEM PER CAPITA COSTS 1 (2009), *available at* http://www.bop.gov/foia/fy09_per_capita_costs.pdf (reporting that in 2009, it cost an average of $24,751 to incarcerate one person); JOHN SCHMITT ET AL., CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 8, 10 (2010) (arguing that more severe sentencing policy for drug offenses in particular, and not an increase in crime, explains the drastic rise in rates of U.S. incarceration since the mid-1980s, and noting that in 2008, incarceration cost state, local, and the federal governments close to $75 billion).

expenditure seems futile has received some judicial attention, but has not been found persuasive.[337] At least one state government has taken steps to incorporate cost into sentencing policy,[338] but the federal Guidelines only consider cost effectiveness in cases involving the elderly or "seriously infirm."[339]

2. Courts May Consider More Severe Conditions of Confinement

A decade before *Booker*, the D.C. Circuit broke away from the *Restrepo* pack and held, in *United States v. Smith*,[340] that a sentencing court may depart downward in anticipation of the harsher conditions of confinement that a noncitizen faces in prison.[341] The court acknowledged *Restrepo* but, relying on a broad definition of "mitigating circumstances" under the Guidelines, disagreed with *Restrepo*'s finding that a sentencing court does not have the discretion to sidestep BOP policies.[342] Notably, the dissenting judge in *Smith* argued that the *Smith* majority imposed an overly individualized sentence, inconsistent with the dictates of the SRA and the then-mandatory Guidelines.[343]

Several courts have followed the primary *Smith* holding, allowing departures where conditions are such that they punish beyond the level that the Commission contemplated. Generally, these courts seem to grapple with what constitutes an unwarranted disparity,[344] and often, when they determine that alienage is the sole cause of a difference in sentence, they depart or issue a variance. The Seventh Circuit in *United States v. Guzman*[345] permitted a departure to account for unduly arduous conditions of confinement, noting that those conditions may be outside the Guidelines' contemplation, but not for deportability, rejecting the notion that it constitutes "double punishment."[346] Similarly, in *United States v. Pacheco-Soto*,[347] decided just after *Booker*, the U.S. District Court for the District of New Mexico characterized a noncitizen inmate's ineligibility for early release, lack of access to a minimum security facility, and lack of lenience

337. *See* United States v. Loaiza-Sanchez, 622 F.3d 939, 942 (8th Cir. 2010) (Bright, J., dissenting) ("[L]ong sentences for illegal aliens punish not only the defendant but the American taxpayer. 'It would be more sensible to give . . . a stiff, but shorter sentence and then to promptly deport him . . . .'" (quoting United States v. Chavez, 230 F.3d 1089, 1092 (8th Cir. 2000) (Bright, J., concurring))); United States v. Maldonado, 242 F.3d 1, 2 (1st Cir. 2001) (referencing a statement by the district court that "the real reason I'm going to depart downward here is because I don't want the taxpayers to pay for him unnecessarily").

338. *See* Monica Davey, *Touching Off Debate, Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 19, 2010, at A1.

339. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1, 5H1.4 (2010).

340. 27 F.3d 649 (D.C. Cir. 1994).

341. *See id.* at 653–55; U.S.S.G. § 5K2.0 (permitting departures from the Guidelines where mitigating or aggravating circumstances exist).

342. *See Smith*, 27 F.3d at 654; *cf.* United States v. Restrepo, 999 F.2d 640, 645–46 (2d Cir. 1993).

343. *See Smith*, 27 F.3d at 656 (Sentelle, J., dissenting).

344. *See supra* notes 105–06 and accompanying text.

345. 236 F.3d 830 (7th Cir. 2001).

346. *Id.* at 834.

347. 386 F. Supp. 2d 1198 (D.N.M. 2005).

for participation in drug treatment as "severe and unfair" and found that those factors formed a sufficient basis to justify a downward departure.[348]

In *United States v. Bautista*,[349] the Seventh Circuit permitted departure where the defendant, a resident alien, faced deportation to Peru where he had no friends and his only family was his abusive father.[350] The court reasoned around the logical inconsistencies that had troubled the *Restrepo* court, arguing that "the apparent paradox [that departure merely hastens deportation] disappears if one views the departure not as remedying the consequences of deportation, but as an offset to those consequences."[351] The court further noted that "nothing in the Guidelines . . . forbids consideration of extralegal consequences that follow a sentence as grounds for a departure."[352]

Relying on *Smith*, two district courts have found that where alien status alone leads to a substantial increase in the severity of a sentence, departure is appropriate. The U.S. District Court for the District of Vermont in *United States v. Simalavong*[353] held that where Canadian citizenship was the only reason a defendant would be incarcerated, the case fell outside of *Restrepo*'s general prohibition because of how exceptional the particular hardship was.[354] There, the defendant's offense score subjected him to probation and community confinement; as a noncitizen, he was ineligible for that form of punishment, and his conviction thus mandated imprisonment.[355] The sentencing court found that where alienage alone made the difference between an incarceratory and a non-incarceratory sentence, the case fell outside the heartland, and departed downward in order to impose the sentence that it would have imposed on a citizen.[356] Similarly, in *United States v. Bakeas*,[357] the U.S. District Court for the District of Massachusetts departed downward where, if the defendant were a citizen, he would have served his sentence in a minimum security prison camp, but as a noncitizen was ineligible for placement in that more lenient type of facility.[358] The court noted that a "downward departure [can be] appropriate when a defendant's non-citizenship is more than collateral to his sentence but instead threatens to change the nature of the entire sentence."[359] The court also found that § 3553(a)'s instruction to consider

348. *Id.* at 1205; *see also* United States v. Jiang, 376 F. Supp. 2d 1153, 1157 (D.N.M. 2005) (stating, without indicating its rationale, that the court may consider deportation in issuing a variance).

349. 258 F.3d 602 (7th Cir. 2001).

350. *Id.* at 604–05.

351. *Id.* at 606.

352. *Id.*

353. 924 F. Supp. 610 (D. Vt. 1995).

354. *Id.* at 613 (distinguishing the court's decision from the general rule of *Restrepo*).

355. *Id.* at 611; *see supra* note 233 and accompanying text.

356. *See Simalavong*, 924 F. Supp. at 613.

357. 987 F. Supp. 44 (D. Mass. 1997).

358. *See id.* at 44 (sentencing the defendant to the "functional equivalent" of the sentence a U.S. citizen would have received).

359. *Id.* at 48.

the "kinds of sentences available"[360] required it to consider conditions of confinement.[361]

According to the D.C. Circuit, departure to evade harsher conditions does not infringe impermissibly upon BOP discretion.[362] The *Smith* court reasoned that generally, it will be difficult to determine which factors impact placement given the BOP's "almost illimitable" discretion.[363] In some cases, however, the court was concerned that the restrictions on noncitizens were imposed strictly as a proxy for flight risk—in other words, that alienage alone creates the increased severity—and a downward departure may be appropriate.[364]

3. The Guidelines Do Not Forbid Accounting for Future, Related Incarceration

Applying broad deference to the district court's sentencing decisions, a Seventh Circuit panel in *United States v. Arowosaye*[365] found that the silence in the Guidelines was sufficient to permit a downward departure where a defendant faced likely incarceration upon being deported to Nigeria.[366] The court found that because the Guidelines do not prohibit consideration of future detention, the sentencing court had the discretion to account for it with a downward departure.[367] The *Arowosaye* court left the decision of whether to account for speculative detention to the district court's discretion.[368]

III. INTERPRETING *BOOKER* AND ITS PROGENY TO CREATE A MORE COMPASSIONATE SENTENCING REGIME

Throughout the Guidelines' history, courts have disagreed over whether alienage can form the basis for a downward departure under section 5K2.0 or a variance under 18 U.S.C. § 3553. This Note argues that the Supreme Court's post-*Booker* line of cases indicates that district courts have the discretion to consider the consequences of alienage in crafting a sentence. Furthermore, this Note encourages the Commission to incorporate consideration of alienage consequences into the Guidelines to promote the SRA's goal of increased uniformity in sentences.

Part III.A of this Note addresses *Booker*'s conflicting commands on appellate review of sentencing decisions, arguing that the Supreme Court's

360. 18 U.S.C. § 3553(a)(3) (2006).
361. *Bakeas*, 987 F. Supp. at 49.
362. *See* United States v. Smith, 27 F.3d 649, 655 (D.C. Cir. 1994). *But see* United States v. Restrepo, 999 F.2d 640, 645 (2d Cir. 1993) (noting that a court's attempt to cure its disagreement with BOP policy would overstep the judicial role).
363. *See Smith*, 27 F.3d at 655.
364. *See id.*
365. 112 F. App'x 528 (7th Cir. 2004).
366. *Id.* at 532.
367. *Id.* at 532; *see also* Symposium, *supra* note 52, at 9–10 (statement of Hon. Nancy Gertner) (suggesting that a person who has spent several months in immigration detention may deserve a downward departure to account for that time served "essentially in custody").
368. *See Arowosaye*, 112 F. App'x at 533.

Guidelines jurisprudence trends toward greater district court discretion and less scrutinizing appellate review, which is at odds with Congress's sentencing goals as expressed in the SRA. Part III.B argues that as a result of this tension, the Commission should adopt a recommendation within the Guidelines that allows district judges to consider the consequences of noncitizenship in sentencing. Placing a recommendation squarely within the Guidelines would obviate Congress's concerns about excessive judicial discretion, increase sentencing uniformity, and be consistent with both *Padilla v. Kentucky* and recent Guidelines amendments. Part III.C recommends a path for consideration of alienage consequences under § 3553(a) in the absence of a specific Guideline.

*A. The Goals of the SRA and the Supreme Court's Post-*Booker *Jurisprudence Are Irreconcilable*

For all the uncertainty about what the SRA and the Guidelines intend to promote,[369] no doubt exists that they sought to increase consistency and decrease disparities in sentencing.[370] To accomplish these goals, Congress restricted judicial discretion,[371] which arguably existed in excess prior to the enactment of the SRA,[372] and replaced it with a mandatory model for arriving at a sentence. After *Booker*, the model remains, but judicial discretion has been reintroduced into the sentencing process.[373] The post-*Booker* trajectory indicates that the Court is struggling to maintain *Booker*'s two holdings.[374] It recognizes that *Booker*'s merits opinion gave sentencing judges very broad discretion,[375] but the remedy curbed that discretion with appellate review in order to promote uniformity, adhere to Congress's sentencing goals,[376] and maintain the continuing validity of the Guidelines.

This irreconcilability is reflected in the different ways that circuit courts have treated lower court decisions considering alienage in sentencing.[377] The difference among the circuit courts that find that immigration consequences may not be considered[378] and those that find that they may[379] seems to rest fundamentally upon conflicting visions of the role of appellate review under *Booker*.[380]

Booker espouses two primary schools of thought on the nature of appellate review.[381] The merits opinion, authored by Justice Stevens, holds

369. *See supra* notes 41–49 and accompanying text.
370. *See supra* notes 34–40 and accompanying text.
371. *See supra* note 33 and accompanying text.
372. *See supra* notes 30–32 and accompanying text.
373. *See supra* note 97 and accompanying text.
374. *See supra* note 150 and accompanying text.
375. *See supra* note 125 and accompanying text.
376. *See supra* note 36 and accompanying text.
377. *See supra* Part II.
378. *See supra* Part II.A.
379. *See supra* Part II.B.
380. *See infra* notes 382–90 and accompanying text.
381. *See infra* notes 382–85, 388–90 and accompanying text.

that judicial fact-finding that leads to an increase in sentencing range is impermissible under the Sixth Amendment.[382] An outgrowth of this holding is that searching appellate review would make the Guidelines more persuasive by pressuring a judge to sentence within the Guidelines.[383] The constraint of appellate review thus calls into question the constitutionality of substantive appellate sentencing review.[384] In other words, Justice Stevens's opinion countenances very limited appellate review of sentencing, deferring instead to the district court's discretion to properly balance factors.[385]

On the other hand, Justice Breyer's remedial opinion makes the Guidelines advisory rather than wholly voluntary.[386] The Guidelines calculation is a required consideration and first step in the sentencing process.[387] The remedial opinion stresses the uniformity Congress sought in passing the SRA[388] and thus requires the use of reasonableness review to maintain that uniformity.[389] Under the remedial holding, the § 3553(a) factors must form a basis for appellate review.[390]

While from a pragmatic point of view it may be plausible to carve out a middle road that reconciles these two holdings,[391] from a doctrinal standpoint, they are arguably incompatible.[392] In its post-*Booker* holdings, the Court has generally—though not consistently[393]—recognized and deferred to the primacy of judicial discretion in sentencing.[394] Since *Booker*, the Court has held that a district court level presumption that the Guidelines are reasonable[395] and appellate requirements of proportionality[396] in variances do not comport with the advisory Guidelines scheme. In these decisions, the Court returned a significant amount of discretion to sentencing judges.[397]

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382. *See supra* note 94 and accompanying text.

383. *See* United States v. Booker, 543 U.S. 220, 261 (2005) (Breyer, J., delivering the opinion of the Court in part) (noting that more scrutinizing de novo review under the PROTECT Act made the Guidelines "more mandatory").

384. *See* Shapiro & Seltzer, *supra* note 175, at 177.

385. *See Booker*, 543 U.S. at 311–12 (Scalia, J., dissenting).

386. *See id.* at 245 (Breyer, J., delivering the opinion of the Court in part).

387. *See supra* notes 98, 167 and accompanying text.

388. *See Booker*, 543 U.S. at 253 (Breyer, J., delivering the opinion of the Court in part).

389. *See supra* note 141–43 and accompanying text.

390. *See supra* note 98 and accompanying text.

391. *See* Richard G. Kopf, *The Top Ten Things I Learned from* Apprendi, Blakely, Booker, Rita, Kimbrough *and* Gall, OSJCL AMICI: VIEWS FROM THE FIELD 1, 1 (Jan. 2008), http://moritzlaw.osu.edu/osjcl/blog/Articles_1/kopf-final-12-28-07.pdf (comparing Justice Ginsburg's signing onto both *Booker* opinions to Orwellian "Doublethink," or "the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them").

392. *See supra* notes 111, 171 and accompanying text.

393. *See supra* notes 133, 152 and accompanying text.

394. *See supra* notes 125–26, 128, 148 and accompanying text.

395. *See supra* note 115 and accompanying text.

396. *See supra* note 120 and accompanying text.

397. *See supra* notes 115–28 and accompanying text.

Judicial discretion, however, is precisely what Congress sought to limit in passing the SRA.[398] Judicial discretion is, in some ways, in conflict with Congress's explicit goal of increased uniformity.[399] These conflicting directives for appellate review under § 3553 underlie the circuit split this Note addresses, wherein some courts of appeals reverse a lower court's consideration of alienage consequences while others permit them to stand.[400] The trend in the Supreme Court's sentencing jurisprudence since 2005 reveals that it currently prefers the more permissive model.[401] In other words, as it is within the district court's discretion to determine when alienage consequences should impact a sentence, those circuits that deferred to a district judge's finding that alienage consequences may merit a variance[402] seem to better comply with the Supreme Court's post-*Booker* pronouncements.

The risk to judges, however, is that if Congress senses an unsavory return to the pre-SRA level of discretion and disparity, it may respond with constitutional sentencing reforms that remove discretion once again.[403] As the experience with the Feeney Amendment demonstrated, federal judges bristle at the removal of discretion if it makes them feel that their hands are tied to mete out unjust, if legal, sentences.[404] Accordingly, this Note advocates relying on more than judicial discretion to take account of alienage consequences.

B. The Guidelines Should Recognize Deportability as a Basis for Downward Departures

Although courts can account for alienage consequences through the exercise of judicial discretion, amending the Guidelines to account for those consequences would be a superior way to administer these factors, as it would better comply with the goals of the SRA[405] and the dictates of *Booker*.[406] A Guidelines amendment would provide a more systematic

398. *See supra* notes 30–36 and accompanying text.

399. *See supra* notes 33, 142–55 and accompanying text.

400. *See supra* notes 285–87, 319–20, 326 and accompanying text.

401. *See supra* notes 115–34 and accompanying text; *see also* Lynch, *supra* note 142, at 4 (arguing that *Kimbrough* indicates that the Court has trended toward interpreting *Booker* to provide more sentencing court discretion).

402. *See supra* Part II.B.

403. *See* Berman, *supra* note 93, at 357 (discussing former Attorney General Alberto Gonzales's proposal to respond to *Booker* with mandatory minimum guidelines); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1495–96 & n.329 (2008) (discussing the possibility that Congress could modify the structure of mandatory minimums to rein in judicial sentencing discretion); *see also* JUDGES' SURVEY, *supra* note 107, tbl.16 (finding that 33% of district court judges believe that mandatory minimums are the leading cause of disparities in sentencing, whereas only 11% think that judicial discretion is the primary cause); *supra* notes 87–89 and accompanying text.

404. *See supra* note 89.

405. *See* Berman, *supra* note 93, at 376 (arguing that the Commission—not Congress or the courts—is the body best suited to make changes to sentencing practice); *supra* notes 33–46 and accompanying text.

406. *See supra* notes 108–09 and accompanying text.

methodology for district courts to factor in alienage, and would help resolve the circuit split created by spotty treatment of such factors under § 3553.

While a Guidelines provision would not bind any judge, it would have two decisive advantages over the current method of relying on § 3553. First, it could provide judges with a suggested points value for deportability, thereby encouraging uniformity in the size of any offset.[407] Second, it would permit the offset to occur within the Guidelines calculation, rather than outside of it, which would subject it to less searching appellate review.[408]

Empirical evidence suggests that the judiciary would support an alienage amendment. In a 2010 survey of district court judges, 62% of judges indicated that family ties and responsibilities are a relevant consideration in a departure or variance, and 49% indicated that community ties are relevant.[409] Only 2% and 5% of judges thought that those considerations were never relevant, respectively.[410] Those two qualities—family and community ties—approximate what deportability accounts for,[411] because they are precisely what is lost to a deported alien who has built a life in the United States.[412]

An amendment would also be consistent with the recent Guidelines changes that recognize the particular burdens on noncitizens.[413] The cultural assimilation amendment specifically addresses the hardship that deportation exacts on those with significant family and community ties.[414] The amendment to the Guidelines that sanctioned fast track departures, and the proposed amendment for stipulation to deportation, speak primarily to the resources saved when a criminal alien cooperates with his removal,[415] rather than on the inherent fairness of his sentence. Nonetheless, these changes indicate, at the very least, that the Commission is willing to take notice of deportability in sentencing, and that at minimum, some situations

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407. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2010) (authorizing a departure of as many as four points for fast track programs); *see also* Letter from Carissa Byrne Hessick, Assoc. Professor, Sandra Day O'Connor Coll. of Law, Ariz. State Univ., to U.S. Sentencing Comm'n 1 (Mar. 17, 2010), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/ASU.pdf (encouraging the Commission to amend the Guidelines to include a factor that is already taken into account under § 3553(a) analysis to promote uniformity).

408. *See supra* notes 117, 173–75 and accompanying text.

409. JUDGES' SURVEY, *supra* note 107, tbl.13.

410. *Id.*

411. *See* Cynthia Hujar Orr, Nat'l Ass'n of Crim. Def. Lawyers, Statement Before the U.S. Sentencing Comm'n 3 (Mar. 17, 2010) (arguing that a downward departure for consequences of alienage would be consistent with U.S.S.G. § 5H1.6, which directs sentencing courts to look at an offender's family ties and responsibilities); *supra* notes 183–84 and accompanying text.

412. *See supra* notes 332–34 and accompanying text.

413. *See supra* notes 182–89 and accompanying text.

414. *See supra* note 184 and accompanying text. Of course, a fundamental difference between the cultural assimilation amendment and this discussion is that the amendment provides a departure where community ties were the motivation for the crime, whereas here such a loss is a consequence of the crime.

415. *See supra* notes 91, 186–89 and accompanying text.

counsel a shorter sentence because of it. They also suggest that the legal fiction that deportation is not punitive is not an obstacle to considering deportation at sentencing.

Padilla v. Kentucky partially dismantled a significant doctrinal obstacle to considering deportability in sentencing. While *Restrepo* and the cases that followed it relied on the formalism that deportation is separate from criminal punishment,[416] *Padilla* states that, to the contrary, immigration consequences are not only properly considered at the sentencing stage, but must be considered to satisfy a defendant's right to effective counsel.[417] To be sure, this Note contemplates a broad reading of *Padilla*, which only dealt with state, not federal, sentencing. While *Padilla* did not go so far as to reject outright the notion that deportation is not criminal punishment, it unquestionably anticipates the serious impact that deportation can have on a defendant, and seems to poke holes in the legal fiction that deportation is not punishment.[418] Given other admissions of the Supreme Court to the effect that deportation can be so severe as to constitute punishment,[419] arguing to the contrary envisages an uphill battle.

Undeniably, there are counterarguments that this solution must confront. The most salient challenge is that it is unfair to give a noncitizen a shorter sentence than a citizen who has committed the same crime,[420] and that considering these consequences actually creates a sentencing disparity.[421] That argument is circular because it assumes that immigration consequences do not contribute to the punishment imposed.

A corollary to this argument is that there is something unfair about shortening the sentence of a person who, in addition to committing a crime, has concomitantly violated the terms of his immigration status.[422] However, in the case of a legal resident at sentencing, something is also being taken away from that person that is not taken away from an otherwise identical citizen, namely his earned privilege of being in the United States and his ability to return to his family at the end of his prison term.[423] Some may argue that it is inappropriate to shorten a sentence simply to offset the application of U.S. law.[424] What this Note proposes, however, is not very different from what *Kimbrough* allowed—permitting the sentencing court to recognize when a penalty that the law imposes is simply too harsh to be reconciled with § 3553(a).[425]

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416. *See supra* notes 218–22 and accompanying text.

417. *See supra* notes 227–29 and accompanying text.

418. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process." (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984))).

419. *See supra* note 220 and accompanying text.

420. *See supra* notes 303–08 and accompanying text.

421. *See supra* notes 106, 180 and accompanying text.

422. *See supra* notes 307, 319 and accompanying text.

423. *See supra* notes 198, 221 and accompanying text.

424. *See, e.g.*, United States v. Wills, 476 F.3d 103, 108 (2d Cir. 2007) ("[T]reating the mere application of immigration law as the basis for a non-Guidelines sentence . . . flouts the goal of individualized justice . . . .").

425. *See supra* note 126 and accompanying text.

This Note does not advocate for an automatic downward departure for deportability[426] such that every noncitizen defendant would get a shorter sentence than a similarly situated U.S. citizen.[427] Rather, this Note argues that defendants who demonstrably suffer a harsher penalty because of their alienage status are entitled to have that consequence considered. A sizeable percentage of federal offenders may face these consequences,[428] and thus it behooves the criminal justice system to devise a consistent and uniform way to address those consequences, rather than adhering to the haphazard method that currently exists.[429]

C. Deportable Offenders Can Be Granted Relief Under 18 U.S.C. § 3553

In the absence of modification to the Guidelines, courts are nonetheless permitted to account for alienage consequences. Two provisions of the SRA indicate that alienage consequences should be considered at sentencing. First, the SRA obliges sentencing judges to consider the "history and characteristics of the defendant."[430] That requirement puts alienage directly before the sentencing judge.[431] As the Eighth Circuit has noted, alienage and the consequences of deportation fit squarely into that statute, and as such, courts are obligated to consider them.[432] Likewise, deportation can be "the most important part" of the criminal sanction for a defendant[433] and therefore, should be taken into consideration among the defendant's other relevant characteristics. The difference between the pre-*Booker* mandatory Guidelines and the post-*Booker* advisory Guidelines is the change in primary focus from the Guidelines calculation to the dictates of § 3553, and, as one district judge has stated, unlike the Guidelines, § 3553 "allows judges to consider everything that is important in sentencing a defendant."[434]

Further, the parsimony principal that restrains every sentence, demanding sentences that are "sufficient, but not greater than necessary" to accomplish the goals of punishment,[435] counsels toward considering alienage consequences insofar as they impose additional punishment. Following *Padilla*,[436] if immigration consequences are properly considered at sentencing, then arguably they are properly considered in the calculus of what constitutes sufficient, but not greater than necessary punishment.

426. Such a proposal may, however, be permissible under some courts' interpretations of *Kimbrough*. *See supra* note 126.

427. *See supra* note 306 and accompanying text.

428. *See supra* notes 16–17 and accompanying text.

429. *See supra* Part II.

430. *See* 18 U.S.C. § 3553(a)(1) (2006).

431. *See* Lynch, *supra* note 142, at 6 ("But whatever guidelines do not capture—and the Guidelines capture almost nothing about individual character and circumstances—must be the preserve of [the sentencing judge's] discretion.").

432. *See supra* notes 328–30 and accompanying text.

433. Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

434. Symposium, *supra* note 52, at 4 (statement of Hon. Lynn Adelman).

435. *See* 18 U.S.C. § 3553(a); *supra* notes 45–46 and accompanying text.

436. *See supra* notes 226–29 and accompanying text.

Therefore, when a defendant can show that deportation, lack of access to prison benefits, and prolonged immigration detention will increase the severity of his sentence, § 3553 requires offsetting those factors to avoid violating the parsimony principal.

CONCLUSION

Every year, thousands of noncitizens face terms of incarceration that are qualitatively different than the prison terms served by similarly situated U.S. citizens. Conflicting views on how properly to punish those confronting these penalties undermine Congress's objective of uniformity in sentencing. The failure to take account of alienage consequences creates needlessly burdensome sentences for a sizeable group of people in violation of the statutory requirement that parsimony guide federal sentencing. Sentencing courts can and should take deportability and its attendant consequences into account in crafting a sentence, upon a finding that demonstrably more severe punishment is the result of those consequences. However, rather than promote reliance solely upon the broad dictates of § 3553, the Commission should explicitly recognize alienage consequences as a proper basis for a sentence reduction because the Commission's imprimatur would increase uniformity, satisfying Congress's policy aims. Likewise, accounting for alienage consequences within the initial Guidelines calculation makes that consideration subject to less searching appellate scrutiny, consistent with *Booker*'s return of discretion to the sentencing judge.