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JUDICIAL SENTENCING DISCRETION POST-*BOOKER*: ARE JUDGES GETTING A DISTORTED VIEW THROUGH THE LENS OF SOCIAL NETWORKING SITES?

Christina R. Weatherford*

INTRODUCTION

Jessica Binkerd, a graduate of the University of California, Santa Barbara,[1] probably never imagined that pictures taken from her MySpace website would one day help send her to jail. Regrettably, that is exactly what happened. On August 6, 2006, Binkerd was driving her co-worker, twenty-five-year-old Alex Baer, home from a party when she swerved into oncoming traffic and collided with another car.[2] Unfortunately, Baer did not survive the accident.[3] Binkerd's blood alcohol level was more than twice the legal limit.[4] Binkerd was subsequently charged and convicted of vehicular manslaughter without gross negligence and driving under the influence of alcohol causing injury.[5] In 2007, a Santa Barbara superior court judge disregarded the probation department's recommendation of less than a one year jail sentence,[6] opting instead to impose a much harsher penalty of five years and four months in state prison.[7] Despite pleas for leniency from the victim's family,[8]

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1. Steve Chawkins, *Grieving Mother Hopes Motion for Mercy Will Prevail*, L.A. TIMES, Jan. 22, 2007, at B1, *available at* http://articles.latimes.com/2007/jan/22/local/me-mercy22 [hereinafter Chawkings, *Grieving Mother Hopes Motion for Mercy Will Prevail*].
2. *Id.*
3. *Id.*
4. People v. Binkerd, 155 Cal. App. 4th 1143, 1146, 1146 n.2 (Cal. Ct. App. 2007).
5. *Id.* at 1146. Binkerd was also charged with driving with a blood alcohol content of 0.20 percent or higher causing injury, but the charge was dismissed. *Id.* at 1146–47.
6. *Id.* at 1150.
7. *Id.* at 1147 (overruling sentence on unrelated grounds). Binkerd was ultimately sentenced to three years in jail after a California Court of Appeals judge overturned the original sentence and remanded the case for resentencing. *Id.* at 1150–51; Chris Meagher, *Drunk Driver Sentenced to Three Years*, SANTA BARBARA INDEP., May 13, 2008, http://www.independent.com/news/2008/may/13/drunk-driver-sentenced-three-years/.

Judge Lodge ultimately decided that pictures posted on MySpace of Binkerd wearing an "I heart Patr–n" t-shirt and drinking with friends after the fatal accident[9] indicated a lack of remorse that warranted a tougher sentence.[10]

Binkerd is not alone. In the last few years, several similar cases have resulted in longer sentences partially due to information taken from social networking sites being presented at the sentencing hearing.[11]

In a world where Facebook and MySpace are among the top five most popular websites[12] and twenty-one million people are "tweeting"[13] in the United States alone,[14] one can see how the plethora of information available online and the ease with which it can be accessed will have a significant impact on the criminal justice system. Many courts already grapple with how to deal with the Internet. For example, the Michigan Supreme Court has gone so far

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8. Steve Chawkins, *Judge Snubs Victim's Kin's Plea for Mercy*, L.A. TIMES, Jan. 27, 2007, at B1, *available at* http://articles.latimes.com/2007/jan/27/local/me-mercy27 [hereinafter Chawkins, *Judge Snubs Victim's Kin's Pleas for Mercy*].

9. Sonia Lucyga, *Pictures Affect Sentencing in UCSB Student DUI Case*, DAILY NEXUS (Santa Barbara, CA), Feb. 1, 2007, *available at* http://www.dailynexus.com/2007-02-01/pictures-affect-sentencing-in-ucsb-student-dui-case/.

10. Chawkins, *Judge Snubs Victim's Kin's Plea for Mercy*, *supra* note 8.

11. *See, e.g.*, Melissa Evans, *Internet Plays Key Role in Vehicular Manslaughter Sentence*, SANTA BARBARA NEWSROOM, Apr. 14, 2007, *available at* http://www.santabarbaranewsroom.com/news/crime--justice/internet-plays-key-role-in-vehicular-manslaughter-sentence.html (showing pictures of defendant holding a glass of wine and drinking related comments defendant posted on MySpace used by District Attorney); Eric Tucker, *Web Photos Work Against Defendants*, CHI. TRIB., July 20, 2008, at 4 (describing how a prosecutor presented pictures from Facebook of defendant dressed in an inmate costume at a Halloween party two weeks after a crash that seriously injured a woman).

12. Daniel E. Harmon, *Five Months of "Faces": Notes on Social Networking's Advantages & Risks*, 26 No. 24 LAWYER'S PC 1 (2009) (noting Facebook ranked third and MySpace ranked fifth on Alexa: The Web Information Company's "Top Sites," which ranks the 100 most popular websites in the United States); *see also* Leah DaSilva, Note, *The Next Generation of Sexual Conduct: Expanding The Protective Reach of Rape Shield Laws to Include Evidence Found on MySpace*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 211, 214 (2008) (noting that MySpace has consistently ranked in the top ten most heavily visited websites in the United States since 2007); Peter T. Wakiyama & Odia Kagan, *Facebook Vanity URLs May Hurt More Than Just One's Pride*, 21 INTELL. PROP. & TECH. L.J. No. 9, 7 (2009) (noting that since its founding in early 2004, Facebook has gained more than 200 million registered users).

13. *See* James Cool & Thomas Young, *Do Well By Doing Good*, 45 TRIAL 32, 36 (Aug. 2009) ("Twitter is a 'microblogging' site that allows you to tell members of your network what you are doing or thinking with 140-character status updates called 'tweets.'").

14. Nielsenwire, *Social Media Stats: Myspace Music Growing, Twitter's Big Move*, July 17, 2009, http://blog.nielsen.com/nielsenwire/online_mobile/social-media-stats-myspace-music-growing-twitters-big-move/.

as banning jurors from using all electronic communications during trial.[15] Presumably, this move is in reaction to recent cases of jurors posting information about an ongoing trial online[16] and going online to research aspects of the trial.[17]

Social networking sites have also affected criminal procedure. For example, scholars have begun to argue that rape shield laws should be expanded to include online behavior in the definition of sexual conduct.[18] Although courts have started to confront problems facing the criminal justice system in the age of the Internet, one area where these pitfalls have not been addressed is in sentencing.

Judicial sentencing discretion has evolved from a policy of almost unlimited discretion, to the application of mandatory guidelines with little judicial discretion allowed, and recently back to, in many ways, unlimited discretion.[19] This Note addresses the evolution and current state of judicial sentencing discretion in the United States and discusses the potential impact the information now available through social networking sites may have on the sentencing system. Part I examines the history of the United States sentencing system. This discussion focuses on the historical backdrop of *United States v. Booker*, a 2005 Supreme Court decision holding the Federal Sentencing Guidelines to be advisory, not mandatory.[20] Part II discusses the rise of the Internet and social networking sites. Part III examines how the world of social networking sites affects sentencing determinations. Particular interest is given to the potential for judges

15. MICH. CT. R. 2.511(H)(2)(c)–(d) (*amended* June 30, 2009, *effective* Sept. 1, 2009) (indicating that judges must instruct jurors that they may not "use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation" or "to obtain or disclose information about the case when they are not in court").

16. *See* United States v. Fumo, No. 06-319, 2009 WL 1688482, at *57–67 (E.D. Pa. June 17, 2009) (making a motion for new trial based on juror's postings on Twitter and Facebook during trial); United States v. Fumo, 639 F. Supp. 2d 544, 547 (E.D. Pa. 2009) (noting a second motion for new trial based on jurors exposure to media reports regarding use of social networking sites during the trial).

17. *See* John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1, *available at* http://www.nytimes.com/2009/03/18/us/18juries.html (mistrial declared in Federal case after nine jurors admitted to doing independent online research regarding a complicated prescription drug case).

18. *See generally* DaSilva, *supra* note 12.

19. *See* discussion *infra* Part I.

20. United States v. Booker, 543 U.S. 220, 245 (2005) (Breyer, J.).

to obtain a distorted view of defendants from their online profiles and what impact this may have on sentencing determinations. Part IV proposes potential ways courts can prevent this distorted view from inappropriately impacting sentencing determinations, including imposing new limits on what evidence judges may use to make their sentencing determinations. However, this Note also recognizes the current trend in Supreme Court decisions moving towards a pre-Guidelines approach of unlimited judicial discretion and recognizes that because of the current climate of the Supreme Court, limits on judicial discretion are unlikely. Thus, this Note ultimately suggests that unless the Supreme Court changes its view on judicial sentencing discretion and allows limitations on the use of information from social networking sites, the potential for a distorted view of defendants may have to be an accepted risk of the sentencing system.

I. EVOLUTION OF JUDICIAL SENTENCING DISCRETION IN THE UNITED STATES

The determination of an appropriate sentence is a difficult issue for judges.[21] And, it is a responsibility that falls squarely to the judge alone.[22] The amount of sentencing discretion allotted to judges has varied throughout history. Traditionally, judges were granted almost unlimited discretion subject only to the bounds of the Constitution and criminal statutes.[23] The implementation of the Federal Sentencing Guidelines restrained judicial sentencing discretion by imposing mandatory sentence ranges applied mechanically based on

21. United States v. Hayes, 589 F.2d 811, 827 n.9 (5th Cir. 1979), *cert. denied* 444 U.S. 866 (1979).

22. 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE CRIMINAL § 526 at 88–89 (3d ed. 1998).

23. *See* 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); Dorszynski v. United States, 418 U.S. 424, 437 (1974) (discussing the "unfettered sentencing discretion" given to trial judges); *see also* U.S. CONST. amend VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and Its Progeny*, 40 CONN. L. REV. 631, 635 (2008) ("Throughout the first two hundred years of the United States, Congress typically provided statutory maximums or sentencing ranges for federal crimes and left federal judges broad discretion to consider any aggravating or mitigating factor they deemed relevant.").

specified factors.[24] Recently, the policy of broad judicial discretion has reemerged.[25]

A. The Federal Sentencing Guidelines

In 1949, the United States Supreme Court stated that a sentencing judge is permitted to "exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."[26] Under this system of indeterminate sentencing, uniformity and predictability were lacking due to the variation of sentences imposed for similarly situated offenders.[27] This view of unregulated discretion continued largely unchecked until the mid-1980s.[28]

It was not until Congress passed the Sentencing Reform Act of 1984 establishing the United States Sentencing Commission[29] that a significant move was made to restrict the largely unfettered discretion allotted to sentencing judges.[30] The Commission promulgated the Federal Sentencing Guidelines in 1987, which drastically narrowed judicial discretion by mandating a sentence range based on the seriousness of the defendant's offense and his past criminal history.[31]

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24. *See generally* U.S. SENTENCING GUIDELINES MANUAL (Nov. 2009); *see also* discussion *infra* Part I.A.

25. *See* discussion *infra* Part I.B–C.

26. Williams v. New York, 337 U.S. 241, 246 (1949).

27. *See* Koon v. United States, 518 U.S. 81, 113 (1996) ("[T]he Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system."); Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2627 (2008) ("[A] penalty should be reasonably predictable in its severity" so criminals "can look ahead with some ability to know what the stakes are in choosing one course of action or another.").

28. *See* 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); United States v. Tucker, 404 U.S. 443, 446 (1972) (noting that federal judges have "wide discretion in determining what sentence to impose" and "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come").

29. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1987, 2017–18 (1984) (codified as amended at 28 U.S.C. § 991 (2006)).

30. Dorszynski v. United States, 418 U.S. 424, 437 (1974) (discussing "unfettered" judicial discretion); *see generally* Robert J. Anello & Jodi M. Peikin, *Evolving Roles in Federal Sentencing: The Post*-Booker/Fanfan *World*, 2005 FED. CTS. L. REV. 9 (2005) (describing the progression of federal sentencing).

31. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2009) (instructions for determining sentence range).

Under the Guidelines, a judge must first consult the sentencing grid to determine the "base offense level."[32] Once the base level is determined, the judge may adjust the offense level upward or downward based on listed offense characteristics.[33] Further adjustment is then made based on the victim, role of the defendant, acceptance of responsibility, criminal history, and offender characteristics.[34] According to Congress, the Sentencing Reform Act, through the Guidelines, sought to remedy the two major pitfalls of indeterminate sentencing: unwarranted disparity and uncertainty.[35]

Initial reaction to the Guidelines was not positive. In fact, in the three years following the passage of the Guidelines two hundred federal judges held them unconstitutional.[36] It was not until the Supreme Court ruled the Sentencing Guidelines were constitutional in 1989[37] that judges began consistently imposing sentences based on the Guidelines. In the following years judges applied the Guidelines with intense rigor.[38] Recently, however, the Supreme Court has slowly begun to return judicial discretion to the sentencing system.[39]

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32. *Id.*

33. *Id.*

34. *Id.*

35. *See* 28 U.S.C. §§ 991(b)(1)(B), 994(f) (2006); Mistretta v. United States, 488 U.S. 361, 366 (1989) (citing S. Rep. No. 98-225, at 38, 65 (1983)).

36. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 524 (2007) (citing KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 196 n.12 (1998)); *see also, e.g.*, Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1254, 1258–59 (9th Cir. 1988) (holding the statute establishing the Federal Sentencing Commission violated the separation of powers doctrine by requiring the Commission be composed of at least three federal judges and authorizing those judges to promulgate substantive regulations, a duty reserved to the legislature).

37. *Mistretta*, 488 U.S. at 371, 384 (finding the Sentencing Guidelines do not violate the nondelegation and separation of powers doctrines of the Constitution).

38. Gertner, *supra* note 36, at 524 (noting that in the eighteen years following *Mistretta* "[j]udges at all levels, trial and appellate, applied the Guidelines as if they were . . . diktats") (citing KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 95 (1998)).

39. *See* discussion *infra* Part I.B.

B. The Booker *Decision*

1. Decisions Leading to Booker*:* Apprendi *and* Blakely

For approximately two decades the Federal Sentencing Guidelines remained mandatory.[40] However, in a line of cases centered on the constitutionality of sentencing guidelines that began in 2000 and culminated with the 2005 *Booker* decision, the Supreme Court ultimately decided the Federal Sentencing Guidelines are advisory, not mandatory.[41] The reasoning that eventually led to the *Booker* decision began with the Court's landmark decision in *Apprendi v. New Jersey*.[42] In *Apprendi*, the Court invalidated a sentence based on a "hate crime" enhancement that increased the sentence range from five to ten years to between ten and twenty years.[43] The Court determined that the sentence enhancement violated the defendant's Sixth Amendment right to a jury trial because the enhancement required the judge to make factual determinations instead of the jury.[44] The Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt."[45]

Four years after *Apprendi*, the Court reaffirmed its holding in *Blakely v. Washington*.[46] In *Blakely*, the Court invalidated part of Washington's Sentencing Reform Act for violating the Sixth Amendment.[47] The trial judge imposed a sentence that was three years above the standard range statutorily prescribed because he found Blakely had acted with "deliberate cruelty."[48] Washington's Sentencing Reform Act provided a judge could impose an "exceptional sentence" based on a finding of aggravating factors.[49]

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40. *See* discussion *supra* Part I.A.
41. United States v. Booker, 543 U.S. 220, 245 (2005).
42. Apprendi v. New Jersey, 530 U.S. 466 (2000).
43. *Id.* at 468–69.
44. *Id.* at 491–92.
45. *Id.* at 490.
46. Blakely v. Washington, 542 U.S. 296 (2004).
47. *Id.* at 303–05.
48. *Id.* at 298.
49. *Id.* at 299 (quoting WASH. REV. CODE §§ 9.94A.120(2), 9.94A.390 (2000)).

Although Blakely's sentence was within the maximum authorized by the statute regulating felonies, the Court held that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[50] Soon after the *Blakely* decision, courts and scholars began to question whether similar sentencing enhancements under the Federal Sentencing Guidelines also violated the Sixth Amendment.[51] A year later the Supreme Court answered this question in *United States v. Booker*.[52]

2. *The* Booker *Decision*

Freddie J. Booker was convicted of possession with the intent to distribute at least fifty grams of crack cocaine.[53] According to the applicable statute, the maximum sentence for the offense was life imprisonment,[54] and the Sentencing Guidelines imposed a base level sentence range of 210 months to 262 months in prison.[55] However, the judge determined Booker possessed an additional 566 grams of crack and was guilty of obstructing justice and was thus subject to a new sentencing range of 360 months to life imprisonment.[56] The judge chose 360 months.[57]

In a five to four decision, the Supreme Court overturned Booker's sentence and held that the mandatory application of the Sentencing Guidelines violated the Sixth Amendment right to trial by jury.[58] The Court relied on the *Blakely* and *Apprendi* reasoning and held that in order to preserve a defendant's Sixth Amendment right to a jury trial "[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a

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50. *Id.* at 303.
51. Berry, *supra* note 23, at 648 (citing Nancy J. King & Susan R. Klein, *Beyond Blakely*, 51-DEC. FED. LAW. 53 (2004), and Cunningham v. California, 549 U.S. 270, 272–73 (2007)).
52. United States v. Booker, 543 U.S. 220 (2005).
53. *Id.* at 227.
54. *Id.* (citing 21 U.S.C. § 841(b)(1)(A)(iii) (2008)).
55. *Id.* (citing U.S. SENTENCING COMMISSION, GUIDELINES MANUAL §§ 2D1.1(c)(4), 4A1.1 (2003)).
56. *Id.*
57. *Id.*
58. *Booker*, 543 U.S. at 233–35 (Stevens, J.) (Scalia, Souter, Thomas, and Ginsburg, JJ., joining).

jury verdict must be admitted by the defendant or proved to the jury beyond a reasonable doubt."[59] The Court held the Sentencing Guidelines as written violated this principle because the Guidelines force a judge to impose a sentence within the specified range upon finding some additional fact without allowing the jury to weigh in.[60] However, the Court did not completely abandon the Guidelines. Instead, in an opinion written by Justice Breyer, the Court determined the appropriate remedy for the unconstitutional application of the Guidelines was to remove those provisions calling for mandatory application.[61] Thus, the Court's decision made the Guidelines "effectively advisory" while maintaining their overall constitutionality.[62]

*C. Judicial Sentencing Discretion Post-*Booker

Since the Court's decision to make the Guidelines advisory, lower courts have been unsure exactly how the Guidelines are to be applied in sentencing determinations. Attempting to follow *Booker*, many courts have implemented a three-step process that begins with a calculation of the appropriate sentence range according to the Guidelines.[63] In determining the appropriate sentence range, the judge takes into consideration the parties' arguments and certain factors enumerated in § 3553(a).[64] These factors are: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant," (2) the need to punish, deter, protect the public, and rehabilitate, (3) the available sentences, (4) the sentence range for similar crimes, (5) policy, (6) "the need to avoid unwarranted

59. *Id.* at 244.
60. *Id.* at 234–35 (citing 18 U.S.C. § 3553(b) (2000)).
61. *Id.* at 245 (Breyer, J.) (Rehnquist, C.J., O'Connor, Kennedy, and Ginsburg, JJ., joining).
62. *Id.*
63. Berry, *supra* note 23, at 650–51 (citing *Booker*, 543 U.S. at 259–60 (Breyer, J.)); *see, e.g.*, Gall v. United States, 552 U.S. 38, 49 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.") (citing Rita v. United States, 551 U.S. 338 (2007)).
64. *Gall*, 552 U.S. at 49–50 ("[A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by the party.").

sentence disparities," and (7) "the need to provide restitution."[65] These factors are intended to inform the judge's determination of an appropriate sentence while striving to maintain the overarching principle that a sentence be "sufficient but not greater than necessary."[66] Based on consideration of these factors, the judge determines whether a sentence within the Guidelines is appropriate.[67] Finally, the judge must identify the sentence being imposed and adequately explain the reasons for that sentence.[68]

The problem post-*Booker* is that many critics, including Justice Scalia, see the Court's decision as a return to indeterminate sentencing because removing the mandatory application of the Guidelines allows judges to impose their own perceptions of justice.[69]

II. THE RISE OF SOCIAL NETWORKING

Since online social networking began to develop in the 1990s, it has become a "universal phenomenon."[70] Online communication has become vital to connecting with the outside world for today's youth.[71] According to a 2007 study by the National School Boards Association, 96% of students with access to the Internet have visited a social networking site.[72] Additionally, a 2009 study by Pew Internet

65. 18 U.S.C § 3553(a) (2006).

66. *Id.*

67. Berry, *supra* note 23, at 651; *see, e.g.*, United States v. Melvin, No. 06–33(FSH), 2009 WL 3128358, at *6 (D.N.J. Sept. 25, 2009) (holding consideration of the 18 U.S.C. § 3553(a) factors required a sentence outside the guidelines range "in order to justly meet the criteria of § 3553(a)").

68. Berry, *supra* note 23, at 651 (citing *Booker*, 543 U.S. at 259–61).

69. *Booker*, 543 U.S. at 304–05 (Scalia, J., dissenting in part) ("The statute provides no order of priority among all those factors . . . the statute—absent the mandate of § 3553(b)(1)—authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public . . . .").

70. DaSilva, *supra* note 12, at 213 (noting Classmates.com and Evite.com, launched in 1995 and 1998 respectively, were some of the first online social networking sites); *see also* Alessandro Acquisti & Ralph Gross, *Imagine Communities: Awareness, Information Sharing, and Privacy on the Facebook* 1 (2006), http://www.heinz.cmu.edu/~acquisti/papers/acquisti-gross-facebook-privacy-PET-final.pdf ("[O]nline social networks are no longer niche phenomena: millions of people around the world, young and old, knowingly and willing use Friendster, MySpace, Match.com, LinkedIn, and [a] hundred other sites to communicate, find friends, dates, and jobs . . . .").

71. Kevin P. Brady, *Student-Created Fake Online Profiles Using Social Networking Websites*, 244 EDUC. LAW REP. 907, 907 (2009).

72. *Id.* (citing National School Boards Association, *Creating and Connecting: Research and Guidelines on Online Social and Educational Networking* (2007), http://nsba.org/

and American Life Project found 47% of online adults use social networking sites.[73] Facebook, one of the most popular social networking sites, boasts more than 500 million active users who upload more than 30 billion pieces of content to the site each month.[74]

A. Defining Social Networking Sites

Generally speaking, social networking sites are "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."[75] While each social networking site is unique, a common characteristic is the user profile.[76] Member profiles generally contain personal information such as age, gender, interests, and hobbies.[77] Profiles can also contain audio and visual content, including video clips and digital photographs.[78] Once the user profile is created, the user "become[s] part of [a] larger online social network[] by linking their . . . profile[]" with other users.[79] Many social networking sites are global in nature and have millions of users across a broad demographic.[80]

SecondaryMenu/TLN/CreatingandConnecting.aspzx).

73. Amanda Lenhart et al., *Social Media & Mobile Internet Use Among Teens and Young Adults*, Feb. 3, 2010, http://pewinternet.org/~/media//Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf (presenting the findings of a survey conducted between Aug. 18 and Sept. 14, 2009 of 2,253 adults age 18 and over).

74. Facebook, Statistics, http://www.facebook.com/press/info.php?statistics (last visited Aug. 25, 2010).

75. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 1, Art. 11 (2007), http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html.

76. *Id.*

77. RICHARD RAYSMAN & PETER BROWN, COMPUTER LAW: DRAFTING AND NEGOTIATING FORMS § 15.06 (2009), *available at* 2008 WL 4520029.

78. *Id.*

79. Brady, *supra* note 71, at 908.

80. Raysman, *supra* note 77; *see, e.g.*, Facebook, Statistics, http://www.facebook.com/press/info.php?statistics (last visited Aug. 25, 2010) ("70% of Facebook users are outside the United States.").

B. The Role of Social Networking Sites in the Courtroom

Social networking sites have impacted several aspects of the legal system in the United States. Of particular importance are concerns regarding the potential misuse of these sites. One area of concern is the use of information posted online to discredit claims of sexual assault by tainting the alleged victim's character.[81] In response to this fear, scholars have argued that the definition of sexual conduct under rape shield laws should be expanded to include online behavior.[82] By expanding the definition in this way, evidence of an alleged rape victim's online behavior becomes inadmissible.

Another area where the impact of social networking sites can be seen is in courtroom procedure. There have been several recent cases of jurors impermissibly using social networking sites during trials that have resulted in some courts banning all electronic communications by jurors.[83] In one such case, juror Eric Wuest, during the prominent fraud trial of the former Pennsylvania State Senator Vincent Fumo, posted messages regarding the trial's progression on his Facebook and Twitter accounts.[84] This led Fumo's defense team to file a motion to halt jury deliberations and remove the juror.[85] The judge ultimately decided not to remove Wuest based on his determination that the juror remained credible and had not influenced the other jurors.[86] Fumo's defense lawyer subsequently filed an additional motion for a new trial based on the other jurors'

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81. *See generally* DaSilva, *supra* note 12 (arguing for the expansion of the definition of "sexual conduct" in rape shield laws to include content posted on social networking sites).

82. *Id.*

83. MICH. CT. R. 2.511(H)(2)(c)–(d) (*amended* June 30, 2009, *effective* Sept. 1, 2009) (indicating that judges must instruct jurors that they may not "use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation" or "to obtain or disclose information about the case when they are not in court").

84. United States v. Fumo, No. 06–319, 2009 WL 1688482, at *61 (E.D. Pa. June 17, 2009) (finding Wuest posted a message to his Twitter account stating, "This is it . . . no looking back now!" and throughout the trial Wuest made several postings on his Facebook page regarding the status of the trial, including the statement: "Stay tuned for the big announcement on Monday everyone!" (citing Govt. Resp. Mot. Judg. Acquittal and for New Trial at 141, May 15, 2009)).

85. *Id.* at *1.

86. *Id.* at *67 ("There was no evidence presented by either party showing that [Wuest's] extra-jury misconduct had a prejudicial impact on the Defendants. The [c]ourt found, and still maintains, that Wuest's actions in no way affected his impartiality.").

exposure to media reports of Wuest's use of social networking sites.[87] Although both motions were ultimately dismissed,[88] the case brought to light the potential for a juror's use of social networking sites to result in a mistrial.

In a similar case, an Arkansas building materials company appealed a $12.6 million verdict against them on the ground that during the trial a juror posted Twitter messages that showed bias.[89] In March 2009, the fear of a mistrial based on jurors' improper use of the Internet became a reality in a Florida courtroom. After eight weeks of trial, a federal judge declared a mistrial after he discovered nine jurors had done independent online research about the complicated pharmaceutical case.[90]

III. IMPACT OF SOCIAL NETWORKING SITES ON SENTENCE DETERMINATIONS

Under the current sentencing system outlined by the Supreme Court in *Booker*,[91] one of the sentencing factors enumerated in 18 U.S.C § 3553(a) is the "history and characteristics of the defendant."[92] Furthermore, according to 18 U.S.C. § 3577, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[93] It is in this aspect of determining an appropriate sentence that information posted on social networking sites comes into play. As illustrated by the case of Jessica Binkerd, photographs and comments from a user's profile

87. United States v. Fumo, 639 F. Supp. 2d 544, 547 (E.D. Pa. 2009).

88. *Id.*

89. *See* Renee Loth, *Mistrial by Google*, BOSTON GLOBE, Nov. 6, 2009, at A15, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/11/06/mistrial_by_google/ (moving for a mistrial and reversal of a $12 million judgment based on a juror's Twitter posting stating: "oh, and nobody buy Stoam. Its [sic] bad mojo and they'll probably cease to Exist [sic], now that their wallet is 12m lighter.").

90. Schwartz, *supra* note 17.

91. United States v. Booker, 543 U.S. 220 (2005).

92. 18 U.S.C. § 3553(a)(1) (2006).

93. 18 U.S.C. § 3577 (1976).

can be introduced as evidence during a sentencing hearing and may ultimately be a deciding factor in the judge's determination of the appropriate sentence.[94]

Lara Buys, another twenty-two-year-old, was also sentenced to prison for driving under the influence of alcohol and vehicular manslaughter based on evidence taken from a social networking site.[95] At the sentencing hearing, the District Attorney presented a picture of Buys from MySpace that showed her holding a glass of wine and comments from the same site, one of which read: "My favorite memory would have been on my birthday one year and you got hammered drinking Jack and ran home to throw up and ended up passed out, good times, good times!!"[96] In an interview, the District Attorney explained that the Internet is a new tool that allows prosecutors to prove what suspects were thinking or if they were remorseful.[97] While the Internet and social networking sites may seem like a promising tool to gain insight into the minds and characters of defendants, the question arises whether the information found on these sites is an accurate depiction of the defendant outside of the online context.

A. Potential for a Distorted View of Defendants Based on Online Profiles

Information posted on social networking sites poses particular concerns that other character evidence typically used at sentencing hearings does not. First, people have a natural "desire to be cool" that influences how they decide to portray themselves online.[98] The cool factor of social networking sites has been present from the inception of the online community. The founders of MySpace, Tom Anderson and Chris DeWolfe, for example, started the site as a place for local

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94. *See* discussion *supra* Introduction.
95. Evans, *supra* note 11.
96. *Id.*
97. *Id.*
98. Danah Boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, *in* YOUTH, IDENTITY, AND DIGITAL MEDIA 119, 129 (David Buckingham ed., 2008) [hereinafter Boyd, *Why Youth (Heart) Social Network Sites*].

bands and clubs to promote themselves and connect with fans.[99] They focused on creating an "open" website with few rules emphasizing users' ability to "freely express themselves."[100] Add the human desire to be cool to the unrestrained environment of MySpace, and the result is profiles that tend to be provocative and often include vulgar language and references to drugs and alcohol.[101]

Social networking site users often look to other users' profiles in order to judge what information they should present on their own profile.[102] Users carefully choose what they put forward in the hope of being accepted by their online peers.[103] This often results in users attempting to create a profile they hope will be deemed cool by the online community.[104] This desire is a reflection of the basic human desire to be accepted by one's peers.[105] The problem with the online setting is the potentially public nature of the information posted.[106]

Social networking site users are faced with the same choice many teens face in everyday life: Cool or lame? Popular or unpopular?[107] Unfortunately, it seems many users do not understand the increased stakes of choosing to be cool online.[108] The desire to be cool may result in an apparent contradiction between a user's online persona and her true character.[109] One scholar, Danah Boyd, gives an example of such contradiction in her book based on a two-year study of United States based youth engagement with MySpace.[110] She received a call

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99. Patricia Sellers, *MySpace Cowboys*, FORTUNE, Sept. 4, 2006, at 66, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2006/09/04/8384727/index.htm.

100. DaSilva, *supra* note 12, at 215.

101. *Id.* at 215–16 (citing David Narkiewicz, *The Dangers of MySpace, Facebook and YouTube,* 30 PA. LAW. 56, 57 (2008) (noting MySpace user who posted "sex, drugs and rock and roll" on list of interests) and Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW 19, 36–37 (2007) (discussing employment recruiters discovery of potential candidates "risqué 'photographs and provocative comments about drinking, recreational drug use, and sexual exploits' . . ." posted on online social networking sites)).

102. *See* Boyd, *Why Youth (Heart) Social Network Sites*, *supra* note 98, at 129.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 133.

107. *Id.*

108. Boyd, *Why Youth (Heart) Social Network Sites*, *supra* note 98, at 133.

109. *Id.*

110. *Id.* at 120.

from an admissions officer of a prestigious college who had planned to admit a young black male from a poor urban community.[111] The admissions office had been deterred from this decision by the gang related content they found on the applicant's MySpace profile, which completely contradicted his admissions essay that had discussed the problems with gangs in his community.[112] Boyd offered this explanation of the apparent contradiction: "Perhaps he needed to acquiesce to the norms of the gangs while living in his neighborhood, in order to survive and make it through high school to apply to college?"[113] Boyd explains that the problem highlights how context is crucial to properly understanding information.[114] When an outsider to the social networking community, such as an admissions officer, potential employer, or judge, views information on a user's profile, they are unprepared to understand the context.[115] Instead, they project the context in which they relate to the individual offline onto the individual in the online community.[116]

In the case of Jessica Binkerd, the judge was presented with images of Binkerd drinking with friends.[117] Viewed in isolation, these pictures only portray one image of the defendant: an irresponsible girl who likes to party. However, add to them the fact that Binkerd was a recent college graduate who volunteered with autistic children and one day hoped to become a psychiatrist,[118] and the image of a hard-partying girl becomes a little harder to imagine.

Throughout history, public life has not been documented and distributed to others to judge, except in the case of celebrities whose lives were deemed important enough to share.[119] With the advent of the Internet and social networking sites, online life has become public life. Information is now easily documented and distributed to a wide

111. *Id.* at 133.
112. *Id.*
113. *Id.*
114. Boyd, *Why Youth (Heart) Social Network Sites*, *supra* note 98, at 133.
115. *Id.*
116. *Id.*
117. *See* discussion *supra* Introduction.
118. Chawkins, *Grieving Mother Hopes Motion for Mercy Will Prevail*, *supra* note 1.
119. Boyd, *Why Youth (Heart) Social Network Sites*, *supra* note 98, at 137.

range of audiences that can use that information in any number of ways.[120] In the courtroom, this means a judge may be inundated with information that at one time would not have been documented or available for consideration. Thus, the question arises whether the Supreme Court's current trend of increasing judicial discretion in sentencing determination is the best method for handling the increased amount of personal information available for consideration.

IV. PREVENTING A DISTORTED VIEW FROM AFFECTING SENTENCING

A. Limiting Judicial Sentencing Discretion

One potential method for preventing online information from presenting a distorted view of defendants is to limit its use in sentencing determinations. However, a limitation on judicial discretion is unlikely to occur given the recent Supreme Court jurisprudence.[121] With the *Booker* decision making the Sentencing Guidelines advisory, the Supreme Court has given much sentencing discretion back to judges.[122] Furthermore, it is well established that a sentencing judge is able to consider virtually any information that may bear on the determination of the appropriate sentence.[123] Adding to this wide discretion is the general rule adopted by courts that evidence considered by a judge prior to imposing a sentence does not need to conform to the same standard as evidence presented at trial in

120. *Id.*

121. *See* discussion *supra* Part I.

122. *See* United States v. Booker, 543 U.S. 220 (2005) (holding that the Federal Sentencing Guidelines are subject to jury trial requirements of the Sixth Amendment, thus the provision of the act making the guidelines mandatory is unconstitutional and must be severed); discussion *supra* Part C (discussing judicial sentencing discretion post-*Booker*).

123. *See, e.g.*, Wasman v. United States, 468 U.S. 559, 563 (1984) (noting the "well-established" discretion allotted to sentencing judges and the ability to consider "any and all information that reasonably might bear on the proper sentence for the particular defendant"); United States v. Borrero-Isaza, 887 F.2d 1349, 1352 (9th Cir. 1989) (noting that sentencing judges have "virtually unfettered discretion" and can consider a "largely unlimited variety of information"); *see also* 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

order to comport with due process requirements.[124] Combined, the *Booker* decision and the general rules of sentencing effectively mean that information taken from online social networking sites is now considered under the broad 18 U.S.C. § 3553(a) standard of "the history and characteristics of the defendant."[125] Thus, sentencing judges, who may not understand the nature and context of online social networking, are now confronted with information taken out of the online context and are using such information to make sentencing determinations.

Justice Scalia's criticism of the Supreme Court's move toward unfettered judicial sentencing discretion indicates that some members of the Court may be uncomfortable with the idea of allowing sentencing judges to consider unlimited evidence when making sentencing determinations.[126] As more judges are confronted with information from social networking sites and are faced with the task of interpreting this information outside the online context, Justice Scalia's criticism of unfettered sentencing discretion is likely to take on a new meaning. However, until the Supreme Court addresses this issue and places some limitation on the information sentencing judges may consider, these judges are left to weigh and balance this information on their own.

B. Alternatives to Limiting Judicial Discretion

Given the broad discretion allotted to sentencing judges and the unlikelihood of imposing direct limitations on the use of information

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124. United States v. Morgan, 595 F.2d 1134, 1136 (9th Cir. 1979) (citing Williams v. New York, 337 U.S. 241 (1949)); *see also* PAUL S. MILICH, COURTROOM HANDBOOK ON GEORGIA EVIDENCE 459 (2009) (noting that the Federal Rules of Evidence do not apply to sentencing) (citing FED. R. Evid. 1101(d)(3)). The *Morgan* court also notes certain exceptions to this general rule. *Morgan*, 595 F.2d at 1136. First, a sentencing judge may not consider unconstitutional prior convictions. *Id.* (citing United States v. Tucker, 404 U.S. 443 (1972)). Second, sentencing judges may not consider false information. *Id.* (citing Townsend v. Burke, 334 U.S. 736 (1948)). Third, sentencing determinations "may not rely upon the information contained in the presentence report unless it is amplified by information such as to be persuasive of the validity of the charge there made." *Id.* (citing United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971)).

125. 18 U.S.C § 3553(a) (2006).

126. *See Booker*, 543 U.S. at 304–05 (Scalia, J., dissenting) ("The statute provides no order of priority among all those factors . . . the statute—absent the mandate of § 3553(b)(1)—authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public . . . .").

from social networking sites, other methods to prevent a distorted view of defendants should be considered by courts and social networking site users themselves.

1. Educating Judges as to the Potential for Distortion

Each state implements its own judicial continuing education requirements. Georgia, for example, mandates that each new judge attend a new judge orientation course sponsored by the Institute of Continuing Judicial Education,[127] and every two years judges are required to attend at least twenty-four hours of continuing education programs.[128] Participation in specialized training and education in topics outside ethics and professionalism is encouraged but not required.[129]

Federal judges are not required to attend any continuing education programs. However, organizations such as the Foundation for Research on Economics and the Environment (FREE) provide optional training and educational opportunities for federal judges. These organizations offer programs that address current issues facing judges. For example, in 2010 FREE offered a program titled: Terrorism, Civil Liberty, and National Security: A Program for Federal Judges, State Supreme Court Justices, and Law Professors.[130]

One possible way to prevent information from social networking sites from being misinterpreted and misused in sentencing determinations is to provide educational programs to judges that address the potential distortion that can occur when such information is taken outside of the online context. By educating judges, who ultimately have the sole responsibility of weighing information presented at the sentencing hearing and determining an appropriate sentence,[131] about the context of online social networking communities, it is less likely that information taken from these sites

127. GA. UNIF. STATE CT. R. 43.C (2003).
128. *Id.* at 43.A.
129. *Id.* at 43.D.
130. Foundation for Research on Economics and the Environment, Current Program Offerings, http://www.free-eco.org/current_programs.php (last visited Aug. 25, 2010).
131. *See* discussion *supra* Part I.C.

will automatically be presumed to present a true depiction of the defendant. Furthermore, through education, judges will be better equipped to properly weigh and balance information from social networking sites under the 18 U.S.C. § 3553(a) factors. Thus, there will be less chance of a distorted view of defendants during the sentencing process.

2. *Warning Social Networking Site Users*

One of the most fascinating aspects of online social networking is users' willingness to post highly personal data, which may not even be an accurate representation of the user's true character offline, onto what is essentially a public forum. Studies have indicated several possible explanations for this behavior.[132] The first possibility is that the "foolishness of youth" results in obliviousness to reputational risks and inability to foresee the consequences reputational harm may have later in life.[133] Teens and young adults compose the majority of social networking site users, and the tendency of this age group to engage in high-risk behavior is well established.[134] Thus, it is not surprising that despite privacy warnings available on most social networking sites, users report retaining an expectation of privacy.[135] The second explanation for users' willingness to post personal information online is that users may not fully understand the technology and long-term implications arising from their online conduct.[136] For example, many users may not comprehend that once information is posted it cannot truly be removed or that third parties

132. *See generally* Avner Levin & Patricia Sanchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001 (2009) (presenting the findings of a study of approximately 2,500 Canadian and American college students and online social network users between the ages of 18 and 24).

133. *Id.* at 1017–18 (2009) (citing Kimberly J. Mitchell et al., *Linking Youth Internet and Conventional Problems: Findings from a Clinical Perspective*, 15(2) J. AGGRESSION, MALTREATMENT & TRAUMA 39 (2007)).

134. *Id.* (citing J. Grunbaum et at., *Youth Risk Behavior Surveillance – United States, 2004*, MORBIDITY & MORTALITY WKLY. REP., May 21, 2004, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5302a1.htm.).

135. *Id.* at 1004.

136. *Id.* at 1018.

may be able to access, alter, or use posted information.[137] Furthermore, only thirty percent of online social network users surveyed in one study claim to know that they have the option to control privacy features such as the visibility and searchability of their profiles.[138]

These two factors indicate that social network site users need to be educated as to the potential public uses of information they post online. Perhaps new regulations requiring social networking sites to warn users of these potential uses would help users contemplate the consequences of posting information online before they sign on. However, because studies indicate that few users actually read the privacy warnings that are now available and even fewer users seem to comprehend the true meaning of the warnings,[139] it is likely up to educators and parents to inform youths as to the potential risks of online social networking. Right now cases like Jessica Binkerd[140] can serve as a warning to users and hopefully raise their awareness as to the potential downsides of online social networking.

CONCLUSION

Given the expanding role social networking sites are playing in the lives of millions of people across the world,[141] the impact of the online world will undoubtedly continue to be felt in many areas of the legal system.[142] Courts will continue to face issues concerning the use, and often times the misuse, of the vast array of information available online.[143] Sentencing judges will likely confront more and more information concerning defendants' character that was undocumented and unavailable for consideration prior to the rise of

137. *Id.* However, the author notes that "[t]his argument . . . ignores the fact that the majority of online socializers grew up online and are perhaps more net-savvy than previous generations." *Id.*

138. Acquisti & Gross, *supra* note 70, at 12 (presenting the findings of a study surveying Facebook users at a United States academic institution and explaining profile visibility relates to who can read a user's profile, while searchability refers to who can find a user's profile).

139. *Id.*

140. *See* discussion *supra* Introduction.

141. *See* discussion *supra* Introduction and Part II.

142. *See* discussion *supra* Part II.B and III.

143. *See* discussion *supra* Part III.

social networking sites. While this information may have the potential to present a distorted view of defendants, the current Supreme Court jurisprudence holding the Federal Sentencing Guidelines advisory[144] and the well-established broad range of evidence admissible for sentencing determinations[145] means that limitations on the use of online information are unlikely. Thus, the best solution may have to be an effort to educate courts as to the potential distortion that can occur when information from social networking sites is taken out of the online context.[146] As for social network users, Jessica Binkerd's story[147] should serve as a warning that information they choose to post online could be used against them when they least expect it.[148]

144. *See* discussion *supra* Part II.

145. *See, e.g.*, Wasman v. United States, 468 U.S. 559, 563 (1984) (noting the "well established" discretion allotted to sentencing judges and the ability to consider "any and all information that reasonably might bear on the proper sentence for the particular defendant").

146. *See* discussion *supra* Part III.A.

147. *See* discussion *supra* Introduction.

148. *See* Evan Wagstaff, *Court Case Decision Reveals Dangers of Networking Sites*, 87 DAILY NEXUS Issue 84 (Feb. 28, 2007), http://www.dailynexus.com/2007-02-28/court-case-decision-reveals-dangers-of-networking-sites/ ("There's nothing wrong with MySpace, but when you put all these crazy pictures on it's going to come back to bite you. It certainly can be used against you when you least expect it."); Utah DUI Trial Lawyer, http://www.utahduilawblog.com/2008/07/articles/utah-dui-sentencings/utah-duis-face-book-and-my-space/ (July 18, 2008, 12:33 MDT) ("Take your myspace and facebook pages down. If you can't do that, tone your pages down. Most of all, confessing your sins on these pages is just as good as a signed confession to convict you.").