A CONTINUING RIGHT TO NOTICE: WHY *IRIZARRY V. UNITED STATES* SHOULD NOT BE THE LAST WORD FOR DISTRICT COURTS IMPOSING POST-*BOOKER* VARIANCE SENTENCES

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Over the past few years, federal sentencing procedure has seen significant changes. Most recently, in Irizarry v. United States*, the Supreme Court held that federal criminal defendants are not entitled to advance notice when a district court judge makes a sua sponte decision to sentence them at variance with the federal Sentencing Guidelines. This Note provides a brief history of the sentencing changes that preceded* Irizarry. *Next, it explains why the* Irizarry *decision wrongly interprets previous cases, ultimately putting a roadblock in what was designed to be an efficient and fair sentencing process. Finally, it explains why it is still the better policy for district courts to voluntarily provide advance notice to defendants sentenced outside the Sentencing Guidelines, regardless of* Irizarry*'s holding that advance notice is not required.*

INTRODUCTION

In *Irizarry v. United States*, the Supreme Court held that criminal defendants were not entitled to reasonable advance notice under Federal Rule of Criminal Procedure 32(h) before a judge made a sua sponte decision to sentence the defendant outside the range recommended by the advisory federal Sentencing Guidelines.[1] The original draft of this Note was written before the Supreme Court intervened and the Rule 32(h) notice debate was still pending among divided U.S. courts of appeals. The goal of this Note was to convince the Supreme Court to grant certiorari and to hand down a ruling ensuring uniform sentencing procedure for defendants convicted under the federal system. More specifically, it sought to persuade the Supreme Court that notice should be provided to defendants

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1. 128 S. Ct. 2198 (2008).

sentenced at variance with the now-advisory Guidelines. As this Note will further address, the Court's recent decision to hold otherwise was unwise. A careful exploration of the backdrop of the controversy, including the recent circuit split, reveals that the *Irizarry* decision fails to respect the policies behind Court precedent and unreasonably denies federal criminal defendants a chance for a fair and efficient resolution of the issues that will determine their sentence. The *Irizarry* decision, however, did not order change for the U.S. courts of appeals; instead, it merely held that it was not mandatory for defendants to receive notice for variance sentences under Rule 32(h). Therefore, this Note urges courts of appeals to go beyond the now-elaborated minimum, and provide advance notice for sua sponte variance sentences.

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Henry Anati swallowed 671.5 grams of heroin in packets before arriving in the United States.[2] He admitted this to customs officials and subsequently pleaded guilty to importing 100 grams or more of heroin into the United States.[3] Before sentencing, all parties reviewed Anati's presentence report, which calculated the reasonable range of his sentence.[4] The presentence report recommended thirty-seven to forty-six months of imprisonment based on Anati's conduct under the federal Sentencing Guidelines.[5] The Government agreed that the length of Anati's sentence should fall within the boundaries established by the presentence report.[6]

At sentencing, Anati argued for a sentence below the range, basing his arguments on fragile health, family circumstances, and the sentencing factors listed in 18 U.S.C. § 3553(a).[7] The district judge went beyond denying Anati's request, imposing a sentence of sixty months' imprisonment.[8] While accepting the presentence report's Guidelines calculation, the judge opted to go above its upper limit.[9] In announcing the decision, the judge referred to "the deleterious impact of heroin in our communities which, in my opinion, is even more serious than cocaine."[10] The judge then announced that "this crime is so serious" that she would impose a sentence outside the Guidelines.[11] Anati's counsel sought time to respond, but the judge refused, stating that the Guidelines listed in the presentence report (and accepted by the Government) were not mandatory.[12]

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2. United States v. Anati, 457 F.3d 233, 234 (2d Cir. 2006).
3. *Id.*
4. *Id.* at 234–35.
5. *Id.* at 235.
6. *Id.*
7. *Id.*; *see* 18 U.S.C. § 3553(a) (2006). Among other things, the § 3553(a) factors allow the district court to consider: (1) the nature and circumstances of the crime; (2) the defendant's characteristics; (3) the need to adequately deter criminal acts; and (4) the need to reflect the seriousness of the crime, advocate respect for the law, and sufficiently punish the offense. *Id.*; *see also infra* note 91.
8. *Anati*, 457 F.3d at 235.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

Based on the presentence report's recommendations and the Government's acceptance of them, Anati had reason to believe that he would be sentenced within the Guidelines. He even had the opportunity to argue that his sentence should be lower, based on the information he had received. Still, Anati did not have the opportunity to respond to the district judge's argument that heroin was worse than cocaine, or, that in her opinion, his sentence should diverge from the Guidelines. Anati deserved notice and the opportunity to rebut. He could not have reasonably known that the judge could depart from the Guidelines for a wide variety of reasons, based solely on the fact that the judge no longer had to abide by them.

However, the Supreme Court recently disagreed and decided that defendants like Anati are not entitled to advance notice.[13] In 2005, a Supreme Court decision rendered the once-mandatory federal Guidelines merely advisory for judges sentencing federal criminal defendants.[14] Before that, when the Guidelines were mandatory for district court judges, the Supreme Court held that the court had to provide reasonable notice for a defendant in Anati's situation.[15] That decision was then codified into Federal Rule of Criminal Procedure 32(h). Nevertheless, the *Irizarry* Court felt that it was unjustified to "extend[] [Rule 32(h)'s] protections to variances" and noted that doing so "is apt to complicate rather than to simplify sentencing procedures."[16]

Typically, a defendant will have notice that his or her sentence may not conform to the Guidelines.[17] Prior to sentencing, the probation officer prepares a presentence report, addressing the issues that are relevant to the defendant's sentence.[18] The report may recommend a departure or variance from the Guidelines, and if so, it must state the reason for the recommendation.[19] Even if the presentence report does not suggest a possible sentence outside the Guidelines, the Government can make a recommendation that the district court consider going outside the Guidelines.[20] In either scenario, the defendant will have notice that an outside-Guidelines sentence is being considered, and will know the reasons why.[21] The defendant's counsel will then be able to address those arguments prior to sentencing.

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13. Irizarry v. United States, 128 S. Ct. 2198, 2203–04 (2008).
14. United States v. Booker, 543 U.S. 220, 266 (2005).
15. Burns v. United States (*Burns II*), 501 U.S. 129 (1991).
16. *Irizarry*, 128 S. Ct. at 2203.
17. *Burns II*, 501 U.S. at 135.
18. Under the Federal Rules of Criminal Procedure, the presentence report must, among other things: (1) calculate the sentencing range, and identify any factors relevant to what an appropriate sentence would be and whether there is a basis for departure; (2) address the defendant's history and characteristics, including any prior criminal record; (3) identify any applicable guidelines or policy statements of the Sentencing Commission; and (4) provide any other information that the court requests. FED. R. CRIM. P. 32(d).
19. FED. R. CRIM. P. 32(d)(1)(E) (stating that a presentence report must "identify any basis for departing from the applicable sentencing range").
20. *Burns II*, 501 U.S. at 135.
21. The probation officer must provide the defendant, his or her attorney, and the Government attorney a copy of the presentence report at least thirty-five days before sentencing, unless the defendant waives that right. FED R. CRIM. P. 32(e)(2).

There are times, however, when neither the presentence report nor the Government's recommendation puts the defendant on notice that he or she might be sentenced at variance with the Guidelines, but the district court nevertheless decides sua sponte to impose a sentence outside the Guidelines.[22] When the probation officer or the Government desires an outcome at variance with the Guidelines, the defendant is put on notice in advance and has a chance to address the pertinent factors.[23] Yet under post-*Irizarry* federal law, a defendant no longer has a similar opportunity for advance notice when the judge makes a sua sponte decision to impose a sentence at variance with the Guidelines.

This Note critiques the Supreme Court's holding that Rule 32(h) should not apply to criminal defendants when a judge imposes a sua sponte variance outside the federal Guidelines, and finds that a viable option remains for district courts in this position to apply Rule 32(h) more broadly than the Supreme Court requires. Even as the Supreme Court previously rendered the Guidelines advisory,[24] it emphasized their continued existence and relevance as a source of predictability and equality for criminal defendants.[25] With the *Irizarry* decision, the Supreme Court has interpreted the *United States v. Booker* decision to lessen the Guidelines' importance, and found that certain protections formerly associated with sentences outside them are no longer needed.[26] The Supreme Court should have honored the goals of its earlier decision in *Booker*, where it sought to ensure that federal sentencing did not become a process where the Guidelines were disregarded, and defendants were unable to anticipate or argue against the projected length of their sentence. Now that a district court is no longer required to state all the specific factors that might affect a defendant's sentence in advance, as it was before *Booker*, a defendant might waste court time trying to anticipate them.

During the 2007 fiscal year, 65,836 defendants were sentenced—many with differing advance notice and procedural opportunities before sentencing.[27] While the *Irizarry* decision technically ended notice disparity, it did so at a cost to defendants nationwide. District courts still have an option—which amounts to a wise practice—to go beyond the basic federal requirements and provide advance notice for defendants in this situation. The *Irizarry* decision should not stop the discussion about procedural fairness for defendants, and indeed, a continuing practice of providing notice to defendants is constitutionally sound, easily workable, and should be utilized regardless of whether it is required.

Part I of this Note examines the historical backdrop against which the *Irizarry* result developed by discussing the origin of the federal Guidelines, prior

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22. *See, e.g.*, *Burns II*, 501 U.S. at 131–32.

23. *Id.* at 135.

24. United States v. Booker, 543 U.S. 220, 266 (2005).

25. *Id.* at 259–60, 264 (noting the continued existence of the Sentencing Commission, which writes the Guidelines, the requirement that district courts still consider the Guidelines when sentencing, and the revised system's enduring ability to reduce sentencing disparity while providing some flexibility).

26. *See infra* notes 212–42 and accompanying text.

27. U.S. SENTENCING COMM'N, U.S. SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT 28 (2007), *available at* http://www.ussc.gov/sc_cases/Quarter_Report_4th_07.pdf.

adjudication of the sua sponte notice debate, and the *Booker* decision that changed the Guidelines from mandatory to advisory. Part II analyzes the pre-*Irizarry* split among the federal courts of appeals, including the rationale behind each circuit's decisions. Part III discusses the *Irizarry* decision and its reasoning, while Part IV argues that the Supreme Court was wrong to hold that Rule 32(h) should not apply to all sentences outside the federal Guidelines. In conclusion, this Note suggests that district courts should provide notice under Rule 32(h) regardless of the lower federal standard because doing so will fulfill *Booker*'s goals of continuing respect for the Guidelines and fostering minimal change in sentencing procedure.

I. PRE-*IRIZARRY* ADJUDICATION OF THE NOTICE DEBATE

The Federal Sentencing Guidelines came about when Congress enacted the Sentencing Reform Act in 1984.[28] Prior to that, district courts enjoyed wide discretion in choosing an offender's sentence, and sentencing disparity was common.[29] In almost every case, district courts had the option of sentencing defendants to imprisonment, placing them on probation or parole, or using a combination of both.[30] Sentencing focused on the offender's rehabilitation, with a view that the punishment could realistically rehabilitate the inmate and increase his or her chances of successfully returning to society.[31]

Complaints over widespread sentencing disparity and the failure of the rehabilitation model led to the eventual enactment of the Sentencing Reform Act.[32] The Act changed the focus from rehabilitation to deterrence, retribution, and promotion of respect for the law.[33] It created the U.S. Sentencing Commission, and tasked it with creating Sentencing Guidelines that district courts should follow in determining the duration of an offender's sentence for a given category of crimes.[34] In doing so, the Act abolished the Parole Commission, which had generally determined the prisoner's release date in the past.[35] After the Sentencing Act, a prisoner's sentence was fixed and could only be shortened for time earned for good behavior while incarcerated.[36] Ultimately, Congress determined that having Sentencing Guidelines would reduce sentencing disparity, but it retained some flexibility by allowing departures from the specified Guidelines in special cases.[37] A departure was to be based on an "aggravating or mitigating circumstance" that was not adequately taken into consideration by the Sentencing Commission.[38]

Before the *Irizarry* decision, the Supreme Court had already addressed the question of whether a district court must provide reasonable notice to a

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28. *Burns II*, 501 U.S. at 132–33.
29. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 363–65 (1989).
30. *Id.* at 363.
31. *Id.*
32. *Id.* at 365–66.
33. *See* 18 U.S.C. § 3553(a)(2) (2006); *see also Mistretta*, 488 U.S. at 367.
34. *Mistretta*, 488 U.S. at 367.
35. *Id.* at 365–67.
36. *Id.* at 367.
37. *See id.*
38. 18 U.S.C. § 3553(b)(1).

defendant when it departs sua sponte from the Guidelines—in *Burns v. United States* (*Burns II*).[39] At the time of the *Burns II* decision, the federal Guidelines were mandatory, meaning that a sentencing court could only depart from them on limited occasions due to the "aggravating or mitigating" circumstances noted above.[40] Aside from the mandatory Guidelines, the situation nearly paralleled the split that led to *Irizarry*: disagreement among the U.S. courts of appeals over whether a defendant was entitled to reasonable notice before sentencing if a district court contemplated a sua sponte departure from the applicable Guidelines range.[41]

A. The Burns II *Holding: Reasonable Notice Required*

The Supreme Court resolved the conflict over reasonable notice for sua sponte departures for the first time in *Burns II*.[42] In an opinion by Justice Marshall, the Court held that a district court could not depart upward from the sentencing range established by the federal Guidelines without first notifying all parties that it intended to depart.[43]

The dispute arose after the Government charged Petitioner William Burns with theft of government funds, making false claims against the government, and attempted tax evasion.[44] For six years, Burns channeled funds from his job at the U.S. Agency for International Development into an account that he controlled.[45] Burns accepted a plea agreement indicating that all parties expected that he would be sentenced within the applicable Guidelines range.[46] Likewise, the probation officer found no basis for a departure in his presentence report, recommending a sentencing range of thirty to thirty-seven months.[47] Neither party objected to the probation officer's recommendations.[48]

However, the district court sentenced Burns to sixty months in prison.[49] The court relied on three factors that neither party had had an opportunity to comment on prior to sentencing: (1) the disruption to governmental functions that Burns caused; (2) the long period of Burns's criminal behavior; and (3) the fact

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39. *Burns II*, 501 U.S. 129 (1991).

40. 18 U.S.C. § 3553(b)(1); *see also Burns II*, 501 U.S. at 133.

41. *See, e.g.*, United States v. Burns (*Burns I*), 893 F.2d 1343, 1348 (D.C. Cir. 1990) (declining to find a requirement that the sentencing court notify the defendant of its intent to depart sua sponte). *But see* United States. v. Palta, 880 F.2d 636, 640 (2d Cir. 1989) (arguing that "adequate notice and the opportunity to contest an upward departure from the guidelines are indispensable to sentencing uniformity and fairness"); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989) (finding that failure to provide advance notice of sua sponte departure was grounds for vacation of sentence).

42. 501 U.S. at 129.

43. *Id.* at 138–39.

44. *Id.* at 131.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 132.

that Burns concealed his false claims and theft offenses with his tax evasion offense.[50]

Reversing the court of appeals,[51] the Supreme Court held that the sentencing court should have provided Burns with advance notice that it intended to depart from the Guidelines for previously unconsidered reasons.[52] The Court grounded its reasoning on then-Federal Rule of Criminal Procedure 32(a)(1), which granted parties "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."[53] Previously, the Sentencing Reform Act amended Rule 32 to generate "focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence."[54] The provision allowing parties to read the presentence report and "comment upon [it]" reflected Rule 32's spirit of efficiency and fairness.[55] The Court reasoned that if advance notice of a sua sponte departure was not necessary, it might waste time by forcing parties to argue every potential factor that the sentencing court might mull over in its consideration of a departure.[56] Worse, concerns outside the presentence report or a prehearing submission could continue to go unaired until sentencing, because defendants would not want to plant new ideas in the court's mind even while rebutting them.[57] In order to maintain consistency with Rule 32's goals, a district court could only preserve its right to depart from the Guidelines based on new factors by providing reasonable notice to the defendant.[58] Such notice was required to include the ground(s) for the court's departure.[59] The Court specifically declined to dictate the length of advance notice that defendants should receive, noting that lower courts could adopt local rules with the appropriate procedure.[60]

B. Rule 32(h) Codifies the Burns II *Holding*

In 2002, Congress went beyond the *Burns II* interpretation of Rule 32(a)(1) and added new section (h) to Rule 32.[61] Rule 32(h) states that:

> [b]efore the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.[62]

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50. *Id.* at 131–32.
51. United States v. Burns (*Burns I*), 893 F.2d 1343, 1343 (D.C. Cir. 1990).
52. *Burns II*, 501 U.S. at 138–39.
53. *Id.* at 135.
54. *Id.* at 134.
55. *Id.* at 135.
56. *Id.* at 137.
57. *Id.*
58. *Id.* at 138.
59. *Id.* at 138–39.
60. *Id.* at 139 n.6.
61. FED. R. CRIM. P. 32, advisory committee's note (2002).
62. FED. R. CRIM. P. 32(h).

The Advisory Committee acknowledged that it created the new provision in light of the *Burns II* holding and stated that it was relevant to both upward and downward departures from the guidelines.[63]

C. Booker *Shakes the Sentencing World*

After *Burns*, the requirement of reasonable notice for a district court's sua sponte departure rested comfortably for over a decade. In early 2005, the Supreme Court's decision in *United States v. Booker*[64] changed the federal sentencing process significantly, planting the seeds out of which the *Irizarry* decision grew.

The *Booker* decision is both lengthy and complex, with two different justices delivering what turned into the majority opinion.[65] *Booker* is actually a consolidation of two cases, both involving defendants convicted of drug-related offenses.[66] In both cases, the United States petitioned for certiorari after a lower court held that a trial judge could not increase a defendant's sentence based on his or her finding of additional facts that were not proven to the jury beyond a reasonable doubt.[67]

In the first part of its opinion, the Court held that besides a prior conviction, any fact that would be necessary in order for a trial judge to sentence a defendant above the maximum authorized timeframe based on the jury's verdict (or a guilty plea) had to be either (1) admitted by the defendant or (2) found by the jury beyond a reasonable doubt.[68] This holding is based on a defendant's Sixth Amendment right to a jury trial.[69] Two of the Court's recent opinions indicated that it would make such a decision. In *Apprendi v. New Jersey*, the Court struck down a sentence that exceeded what was available under jury findings, because the trial judge increased it based on a post-verdict finding that the defendant had violated another law.[70] In *Blakely v. Washington*, the Court reaffirmed this principle by holding that a judge could not impose an "exceptional sentence" based

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63. FED. R. CRIM. P. 32, advisory committee's note.

64. 543 U.S. 220 (2005).

65. *Id.* at 225 (stating that Justice Breyer and Justice Stevens each delivered the opinion of the Court in part).

66. *Id.* at 227–28.

67. In the case of Respondent Freddie Booker, the trial court judge increased Booker's sentence based on additional facts not found by the jury, and the Court of Appeals for the Seventh Circuit reversed. *Id.* Alternatively, although the trial judge in Respondent Duncan Fanfan's case found additional facts beyond the jury's findings, he sentenced Fanfan based on only what was proven to the jury. *Id.* at 228–29.

68. *Id.* at 244. As an illustration, Booker could have been sentenced to a maximum of twenty-one years and ten months in prison based on the jury verdict. *Id.* at 227. However, the trial judge found by a preponderance of the evidence that Booker had possessed a larger quantity of drugs and obstructed justice (facts that the jury did not find). *Id.* With the additional findings, the trial judge sentenced Booker to thirty years in prison. *Id.* The *Booker* holding effectively said that the judge could not consider those additional facts not admitted by the defendant, or proven to the jury beyond a reasonable doubt, as considerations in imposing a sentence. *See id.*

69. *Id.*

70. 530 U.S. 466, 490 (2000).

on "aggravating facts" because the jury verdict alone would not have authorized it.[71]

The first *Booker* holding paved the way for a drastic change in federal sentencing, which came in the form of the second holding. There, the Court determined that the portions of the Sentencing Act making the Guidelines mandatory must be removed.[72] This holding rendered the Guidelines advisory instead of mandatory.[73] Ultimately, the Court found that the Guidelines, as written, could not serve the role that Congress intended in light of the first holding.[74] The majority determined Congress would have preferred the excision of the mandatory provisions of the Sentencing Act over the invalidation of the entire law.[75]

First, the Court acknowledged the judge-based focus of the Sentencing Act.[76] The Court found that judges must try to determine and punish based upon the actual conduct of the offender in order to fulfill the congressional goals of the Guidelines.[77] Therefore, the Sentencing Act allowed a judge to use a variety of resources to arrive at a decision that truly reflected the actual conduct.[78] However, the new requirement that a jury find all facts relevant to sentencing would presumably "weaken the tie between a sentence and the offender's real conduct," and diminish the Sentencing Act's overarching goal of eliminating sentencing disparity.[79] Judges would now be unable to sentence based on any information acquired after the verdict, and instead they would be limited to sentencing based upon what the prosecutor chose to charge.[80] Because the Court reasoned that Congress would not have passed the same Sentencing Act in light of the first *Booker* holding, it decided to remove only the portions of the Act making the Guidelines mandatory.[81] Despite the Guidelines' newfound advisory nature, the Court stated that "the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals."[82] The Sentencing Act, as

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71. 542 U.S. 296, 303–04 (2004).

72. *Booker*, 543 U.S. at 245. The two portions that had to be removed were 18 U.S.C. § 3553(b)(1), which states that a sentencing court "shall impose a sentence" within the Guidelines, and 18 U.S.C. § 3742(e), which provides for de novo review of departures from the Guidelines range. *Id.* at 259.

73. *Id.* at 245.

74. *Id.* at 249 ("Several considerations convince us that, were the Court's constitutional requirement added onto the Sentencing Act as currently written, the requirement would so transform the scheme that Congress created that Congress would likely not have intended the Act so modified to stand.").

75. *Id.*

76. *Id.* (noting that the Act directed "the court" to consider certain things such as the nature and circumstances of the crime, and that those words did not include the jury).

77. *Id.* at 250–51 (noting that many statutes could include a wide range of actions that would all meet the statutory definition).

78. *Id.* at 251–52. For instance, judges often utilize the probation officer's presentence report to observe the particular offender's conduct under the statute. *Id.* at 251. Such reports are often unavailable until after the trial. *Id.*

79. *Id.* at 252.

80. *Id.* at 256.

81. *Id.* at 246.

82. *Id.* at 259.

amended, could still work to reduce unjustified sentencing disparities.[83] The Court emphasized the Guidelines' continuing importance as a source that district courts must take into account in every sentencing.[84] The Sentencing Commission would remain in place, researching and revising the Guidelines so they could continue to serve their purpose.[85]

D. Post-Booker *Sentencing Procedure*

By rendering the Guidelines advisory, *Booker* necessarily changed the sentencing process. Under the mandatory Guidelines system, a district court had to impose a sentence within the Guidelines unless a specific exception existed.[86] In the event that an exception did exist, the sentencing court would engage in a "departure" from the Guidelines.[87] District courts were bound by these two options: sentencing within the Guidelines-recommended range or departing from it based on a specific exception.

After *Booker*, courts have the additional option to impose a non-Guidelines sentence, also known as a variance.[88] To do so, the district court must still calculate the appropriate Guidelines sentence and use it in an advisory nature.[89] If the judge feels that the Guidelines range and available departures do not reflect the specifics of a defendant's case, he or she can sentence that person independent of both.[90] Still, should the sentencing court choose to vary from the Guidelines sentence, it must do so based on the factors in 18 U.S.C. § 3553(a).[91] A variance is different from a departure because it is not based on the Guidelines, but instead the judge's assessment of the defendant's case in light of the § 3553(a) factors.[92] A departure is still a "Guidelines sentence" because the circumstances

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83. *Id.* at 264.

84. *Id.*

85. *Id.*

86. *Id.* at 259; *see also* 18 U.S.C. § 3553(b)(1) (stating that a court shall impose a within-Guidelines sentence unless there is an "aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission").

87. *E.g.*, United States v. Barragan-Espinoza, 350 F.3d 978, 983 (9th Cir. 2003) (finding that upward departure was authorized).

88. *E.g.*, United States v. Mejia-Huerta, 480 F.3d 713, 721 (5th Cir. 2007).

89. *Id.*

90. *See, e.g.*, United States v. Irizarry, 458 F.3d 1208, 1211–12 (11th Cir. 2006).

91. *Mejia-Huerta*, 480 F.3d at 721. Among other things, § 3553(a) requires criminal sentences to reflect the following factors: (1) the defendant's history and characteristics; (2) the type and circumstances of his or her offense; (3) the need to deter crime; (4) the need to punish for the offense and promote respect for the law; (5) the need to protect the public from a defendant's further crimes; (6) the need to treat the defendant in the most effective manner; (7) the types of sentence and sentencing range established pursuant to the Sentencing Guidelines; (8) any applicable policy statements; (9) the need to reduce sentencing disparity; and (10) the need to provide victims restitution. 18 U.S.C. § 3553(a) (2006).

92. *See* United States v. Sitting Bear, 436 F.3d 929, 934–35 (8th Cir. 2006) (stating that a variance sentence is driven by "the other § 3553(a) considerations").

under which a judge can depart are spelled out in the Guidelines themselves.[93] The § 3553(a) factors are distinct from the Guidelines, and so a sentence based on them is referred to as a non-Guidelines sentence or a variance.[94]

The *Booker* decision also changed postsentencing procedure. Prior to *Booker*, appellate courts were to review departures from the Guidelines de novo.[95] Now, appellate courts review sentences outside the Guidelines for unreasonableness, focusing on the factors of § 3553(a).[96]

II. THE SPLIT BEFORE *IRIZARRY*

While *Booker* changed the sentencing process, it did not do so unambiguously. Several circuit splits emerged in light of the *Booker* decision.[97]

The *Booker* Court did not overturn *Burns II*, nor did it order any changes to sentencing procedure after holding that the Guidelines were advisory.[98] Despite this, the U.S. courts of appeals split on whether Rule 32(h) still required a district court to give reasonable notice to parties in a case before imposing a sentence outside the now-advisory Guidelines.[99] The First, Third, Fifth, Seventh, Eighth, and Eleventh Circuits held that the requirements of Rule 32(h) do not apply to the post-*Booker* sentencing process.[100] The Second, Fourth, Sixth, Ninth, and Tenth Circuits disagreed with that conclusion, and imposed a continuing requirement of notice to defendants sentenced outside the Guidelines for reasons not stated in the presentence report or governmental prehearing submission.[101] The circuits holding

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93. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.2 (2008) (authorizing upward departure if serious physical injury resulted); *see also Mejia-Huerta*, 480 F.3d at 721 (still referring to sentences with an upward or downward departure as "Guidelines sentence[s]").

94. *See Mejia-Huerta*, 480 F.3d at 721. However, the Guidelines range is one of the considerations mentioned in § 3553(a). 18 U.S.C. §3553(a)(4)(A).

95. United States v. Booker, 543 U.S. 220, 261 (2005).

96. *Id.* (setting new standard for appellate review after the decision).

97. For example, the courts are split on the availability of Sentencing Guidelines departures after *Booker*. *Compare* United States v. Laufle, 433 F.3d 981, 987 (7th Cir. 2006) (stating that district courts have more authority to sentence outside the Guidelines after *Booker*, so "departures are beside the point"), *with* United States v. McBride, 434 F.3d 470, 477 (6th Cir. 2006) (stating that "Guideline departures are still a relevant consideration for determining the appropriate Guideline sentence," which is "then considered in the context of the section 3553(a) factors").

98. 543 U.S. 246 (2005).

99. See *infra* notes 100–01 and accompanying text for more detail on which circuits have held that reasonable notice is no longer required, and which have held that it is.

100. *See, e.g.*, United States v. Vega-Santiago, 519 F.3d 1 (1st Cir. 2008); United States v. Mejia-Huerta, 480 F.3d 713, 721 (5th Cir. 2007); United States v. Vampire Nation, 451 F.3d 189 (3d Cir. 2006); United States v. Walker, 447 F.3d 999 (7th Cir. 2006); United States v. Sitting Bear, 436 F.3d 929 (8th Cir. 2006); United States v. Irizarry, 458 F.3d 1208 (11th Cir. 2006).

101. *See, e.g.*, United States v. Anati, 457 F.3d 233, 238 (2d Cir. 2006); United States v. Davenport, 445 F.3d 366, 370 (4th Cir. 2006); United States v. Cousins, 469 F.3d 572, 579 (6th Cir. 2006); United States v. Evans-Martinez, 448 F.3d 1163 (9th Cir. 2006); United States v. Dozier, 444 F.3d 1215, 1217 (10th Cir. 2006).

that notice was not required interpreted *Booker* to deny not only the mandatory application of the Guidelines, but also associated procedural opportunities.[102] On the other hand, the circuits that continued to require notice came to their respective holdings by identifying the policies behind the *Burns II* notice requirement and applying them to post-*Booker* sentencing.[103]

The debate between the circuits that led to *Irizarry* is explored further in the following sections. For each position, this Note provides an in-depth case study of one circuit's decisions, followed by brief summaries of cases from other circuits that reached the same conclusion.

A. First View: Reasonable Notice Is Not Required

1. Case Study: Eighth Circuit

The Eighth Circuit first held that Rule 32(h) did not survive the *Booker* decision, and defendants were no longer entitled to reasonable notice for sentences above the mandatory Guidelines range.[104] Even so, it was a tentative step, because the court there sentenced the defendant within the initial range that the presentence report and the Government recommended.[105] Later, the court reaffirmed its initial disapproval of reasonable notice. In *United States v. Hawk Wing*, the court acknowledged that some notice was still required under Rule 32,[106] though it concluded that the presentence report gave sufficient indication of a possible upward departure.[107]

The Eighth Circuit drifted still further away from its support for notice under Rule 32(h) in *United States v. Sitting Bear*.[108] Sitting Bear was convicted of second degree murder, and his sentencing range under the Guidelines was 151 to 188 months of imprisonment.[109] However, the district court concluded that upward departures from the Guidelines did not exist after *Booker*.[110] Therefore, the court referred to its sentence of 228 months of imprisonment as "non-Guidelines."[111] The Eighth Circuit endorsed this view, holding that notice is not required for non-

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102. *See supra* note 100 and accompanying text.

103. *See supra* note 101 and accompanying text.

104. United States v. Egenberger, 424 F.3d 803, 805–06 (8th Cir. 2005).

105. *Id.* at 806. Before imposing an above-Guidelines sentence, the *Egenberger* court had adjusted the Guidelines downward from the range in the presentence report based on other factors. *Id.* at 804. Therefore, at the time the court imposed a sentence of thirty months (which was within the presentence report's recommendations), the Guidelines actually reflected a sentencing range of eighteen to twenty-four months. *Id.*

106. 433 F.3d 622 (8th Cir. 2006).

107. *Id.* at 627 (holding that where the presentence report noted that the defendant had an extensive criminal history that was not included in his sentencing range calculation, the defendant had sufficient notice that the district court might sentence upwards of the Guidelines based on its desires to deter further conduct and treat the defendant in the most effective way possible).

108. 436 F.3d 929 (8th Cir. 2006).

109. *Id.* at 932.

110. *Id.* In light of this reasoning, the court immediately moved to the § 3553(a) factors to decide the appropriate sentence duration.

111. *Id.*

Guidelines (or variance) sentences.[112] When the district court based its sentence upon the § 3553(a) factors, it effectively abandoned the Guidelines.[113] Therefore, Sitting Bear's claim of a right to notice "lack[ed] merit."[114]

Last, the Eighth Circuit reaffirmed its *Sitting Bear* view in *United States v. Levine*.[115] Levine was sentenced to ninety-six months imprisonment after his conviction of various offenses, including money laundering and conspiracy to possess a protected computer without authority.[116] After announcing its Guidelines calculations (with no objections), the district court stated that it would follow *Sitting Bear* protocol and impose a variance sentence.[117] The Eighth Circuit cited that methodology with approval, noting that "the sentencing court . . . considered various factors, including the prior SEC adjudication, the factors in 18 U.S.C. § 3553(a), and Levine's character witness and letters."[118] These considerations qualified the sentence as a variance, and therefore, the defendant was not entitled to reasonable notice under Rule 32(h).[119]

2. Other Circuits

The First Circuit weighed in on the notice debate after the Supreme Court granted certiorari in *Irizarry*, stating that it needed to provide guidance in the meantime for "an issue potentially present in every sentencing."[120] In one of the longer discussions of the 32(h) notice debate, the court in *United States v. Vega-Santiago* held that notice was not required for variance sentences post-*Booker*.[121] The court dismissed the applicability of Rule 32(h) to variances on plain language grounds, citing the rule's reference to departures only.[122] Next, it held that the reasoning behind *Burns* was not enough to establish a "*judicially* created rule requiring automatic advance notice for variances."[123] It based its decision on many of the arguments that the Supreme Court would echo months later in *Irizarry*: (1) a concern that judges would have to explain their sentencing decision and rationale behind it before full presentation at the sentencing hearing; (2) a preference for giving notice only in cases of true unfair surprise, instead of a mechanical rule extending to all variances; and (3) a general observation that sentencing is "far more broad, open-ended and discretionary" after *Booker*, and advance notice did not comport with the complex factors that judges had to weigh before making a final decision.[124]

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112. *Id.*
113. *See id.*
114. *Id.*
115. 477 F.3d 596 (8th Cir. 2007).
116. *Id.* at 600, 606.
117. *Id.* at 606.
118. *Id.*
119. *Id.*
120. 519 F.3d 1, 2 (1st Cir. 2008).
121. *Id.*
122. *Id.* at 3.
123. *Id.*
124. *Id.* at 4–5.

The Third Circuit echoed the Eighth Circuit's distinction between a departure and a variance sentence in *United States v. Vampire Nation*.[125] There, the district court sentenced the defendant to sixty months imprisonment, despite a Guidelines calculation of forty-six to fifty-seven months.[126] Because the court imposed this sentence based on the application of the § 3553(a) factors under *Booker*, the sentence did not qualify as a departure warranting advance notice.[127]

The Fifth Circuit "enter[ed] the fray" and held that the requirements of *Burns II* and Rule 32(h) did not apply to variance sentences.[128] The court stated that by imposing a variance sentence, the sentencing court "did what any district court is empowered to do" without the requirement of notice.[129] The Fifth Circuit also distinguished between a departure and a variance sentence, noting that the plain language of Rule 32(h) limited itself to departures.[130]

In *United States v. Walker*, the Seventh Circuit affirmed its earlier opinion that post-*Booker*, departures were "obsolete" and "beside the point."[131] Here, the defendant had "full knowledge of all the facts" that the district court relied on in making its decision under the § 3553(a) factors, and no further steps were required.[132] The Seventh Circuit also brushed aside any due process concerns, saying that "it is unclear" how they could be implicated by the district court's *Booker*-authorized consideration of the § 3553(a) factors.[133]

Last, in the case that went all the way to the Supreme Court,[134] the Eleventh Circuit held that reasonable notice was not required under Rule 32(h) after *Booker*.[135] Following other circuits, the *Irizarry* court distinguished a departure from a variance and determined that because parties were inherently on notice of the § 3553(a) factors and the available statutory range, a defendant required no further notice.[136]

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125. 451 F.3d 189 (3d Cir. 2006).
126. *Id.* at 195.
127. *Id.*
128. United States v. Mejia-Huerta, 480 F.3d 713, 722 (5th Cir. 2007).
129. *Id.* at 722–23.
130. *Id.* at 721–22.
131. 447 F.3d 999, 1006 (7th Cir. 2006). While other circuits have retained the concept of a Guidelines departure and simply distinguished it from a variance, see, for example, *Mejia-Huerta*, 480 F.3d at 721, the Seventh Circuit's cases indicate that the *Booker* holding eliminated departures completely, see, for example, United States v. Johnson, 427 F.3d 423, 426 (7th Cir. 2005) (stating that departure terminology is "pre-*Booker*," and now judges simply characterize sentences as fitting within the Guidelines range or not).
132. *Walker*, 447 F.3d at 1007.
133. *Id.*
134. Irizarry v. United States, 128 S. Ct. 2198 (2008).
135. United States v. Irizarry, 458 F.3d 1208 (11th Cir. 2006).
136. *Id.* at 1212.

B. Second View: Reasonable Notice Is Still Required

1. Case Study: Tenth Circuit

In *United States v. Dozier*, the defendant was sentenced to forty-eight months imprisonment.[137] The defendant had been convicted of mail fraud, and the applicable Guidelines range was calculated at twenty-seven to thirty-three months.[138] However, the district court departed upward based on victim impact statements that defense counsel was never able to read or review.[139] The Tenth Circuit interpreted Rule 32(h)'s protections broadly, stating that it allowed criminal defendants "the right to be notified of any intention by the district court to enhance a sentence and any basis for such an enhancement."[140] The court would "not question the viability of Rule 32(h) and *Burns* after *Booker*," and therefore held that reasonable notice was still mandatory for defendants whose sentences fell outside the Guidelines.[141]

A few weeks later, the Tenth Circuit addressed the same problem in *United States v. Calzada-Maravillas*.[142] There, the district court departed nearly twenty months upward from the maximum Guidelines sentence, based on the defendant's criminal history and his likelihood of recidivism.[143]

In *Calzada-Maravillas*, the Tenth Circuit characterized the sentence as a "hybrid departure" from the Guidelines because the district court departed based on both criminal history (which was a permissible ground for departure under the mandatory Guidelines scheme) and the § 3553(a) factors.[144] Still, the court limited its discussion to upward departures, stating that "our remanding for resentencing due to the lack of notice under either rationale would accomplish the same result . . . ."[145] This language indicates that the Tenth Circuit recognized a difference between a departure and a variance, but felt that notice should be provided regardless of the sentence's classification.

2. Other Circuits

The Second Circuit decided the *Anati* case, which opened this Note.[146] The court acknowledged a difference between a departure and variance, but stated that a defendant should receive advance notice of a district court's intent to impose either kind of sentence.[147] Specifically, the *Anati* court held that Rule 32(i)(1)(C)'s

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137. 444 F.3d 1215 (10th Cir. 2006).
138. *Id.* at 1216–17.
139. *Id.* at 1217.
140. *Id.*
141. *Id.* at 1217–18.
142. 443 F.3d 1301 (10th Cir. 2006).
143. *Id.* at 1302–03.
144. *Id.* at 1304–05.
145. *Id.* at 1305.
146. 457 F.3d 233 (2d Cir. 2006); *see also* notes 2–27 and accompanying text.
147. *Anati*, 457 F.3d at 236–38.

requirement of an opportunity to comment on "appropriate sentencing matters" applied whether the sentence was to be a departure or variance.[148]

In *United States v. Davenport*, the Fourth Circuit weighed in on the circuit split after the district court judge sentenced above the advisory Guidelines.[149] Here, the court held that "notice of an intent to depart or vary" from the Guidelines was still a "critical part" of the sentencing process after *Booker*.[150] While the failure to provide advance notice was error, the court voiced its doubts that it prejudiced the defendant because he addressed the § 3553(a) factors in his presentence letter to the district court.[151]

The Sixth Circuit joined the other circuits arguing for advance notice in *United States v. Cousins*.[152] The court determined that the guidance provided by the departure criteria under the mandatory Guidelines scheme was no better or worse than that provided by the § 3553(a) factors.[153] Because advance notice was required when the departure criteria applied, it should also be under the advisory Guidelines.[154]

Last, in *United States v. Evans-Martinez*, the Ninth Circuit agreed that Rule 32(h) still required advance notice.[155] Without the requirement of advance notice, the court noted that the "issues which impacted sentencing were not thoroughly tested . . . ."[156] Additionally, the rationale for providing notice was unaffected by the post-*Booker* advisory scheme because district courts were still required to calculate the Guidelines range as a starting point for sentencing.[157]

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148. *Id.* at 236. Rule 32(i)(1)(C) allows parties to comment on "the probation officer's determinations and other matters relating to an appropriate sentence." FED. R. CRIM. P. 32(i)(1)(C). The *Burns* court used this provision (then known as Rule 32(a)(1)) in arriving at its decision that advance notice was required for departures. Burns v. United States (*Burns II*), 501 U.S. 129, 136 (1991).

149. 445 F.3d 366 (4th Cir. 2006). The district court judge sentenced to what it believed was the statutory maximum, stating that had the Guidelines been mandatory, it would have departed. *Id.* at 369. The court based its departure on its opinion that a Guidelines sentence would not show the seriousness of the offense, promote respect for the law, or provide deterrence. *Id.*

150. *Id.* at 371.

151. *Id.* However, the sentence was vacated on the basis of its unreasonableness. *Id.* The Fourth Circuit affirmed its view in *United States v. McClung*, where the failure to provide advance notice was not error when the defendant commented on all relevant § 3553(a) sentencing factors in his presentencing memorandum. 483 F.3d 273, 276–77 (4th Cir. 2007).

152. 469 F.3d 572, 579 (6th Cir. 2006).

153. *Id.* at 580.

154. *Id.*

155. 448 F.3d 1163, 1167 (9th Cir. 2006).

156. *Id.*

157. *Id.*

III. THE SUPREME COURT RESOLVES THE DEBATE IN *IRIZARRY V. UNITED STATES*

The Supreme Court issued the *Irizarry* opinion on June 12, 2008.[158] Justice Stevens delivered the majority opinion for the 5-4 court, which included a concurring opinion by Justice Thomas. Justice Breyer wrote the dissenting opinion. The case began when Richard Irizarry pled guilty to making a threatening interstate communication in violation of 18 U.S.C. § 875(c). Irizarry admitted to sending e-mails threatening to kill his ex-wife and her husband. His presentence report stated that Irizarry had asked another inmate to kill his ex-wife's husband. The presentence report recommended a sentence within the Guidelines.[159]

The Government did not object to the presentence report, but it did call Irizarry's ex-wife to testify at the sentencing hearing.[160] Irizarry's cellmate also testified, though when Irizarry testified, he denied asking his cellmate to kill his ex-wife's husband.[161] After hearing testimony from both sides, the district judge announced that the Guidelines range was "not appropriate" for Irizarry, and sentenced him to the statutory maximum instead.[162] She opined that Irizarry's conduct was "most disturbing," and stated that she felt he would continue threatening his ex-wife no matter what kind of court supervision he was under.[163] Defense counsel objected to the lack of notice, but the district judge rejected his contention,[164] and the Eleventh Circuit affirmed both the sentence and lack of notice.[165]

In the Supreme Court decision, the majority began by discussing the *Burns II* opinion, and that Court's decision to require notice of a contemplated departure to avoid "the constitutional problems that might otherwise arise." It highlighted the changes brought by the *Booker* decision. First, the defendant and the Government could no longer "place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for notice in *Burns*." Second, the due process concerns that would have accompanied a lack of notice "in a world of mandatory Guidelines" no longer existed.[166]

The rest of the majority opinion focused on its assessment of the practicalities of providing notice. The Court noted that a district judge would "normally be well-advised to withhold her final judgment until after the parties have had a full opportunity to present their evidence and their arguments."[167] Furthermore, adding a separate notice requirement might "create unnecessary

158. 128 S. Ct. 2198 (2008).

159. *Id.* at 2200. The Government did mention that Irizarry's criminal history category might not affect his past conduct or likelihood of committing future crimes; however, it ultimately recommended a sentence within the Guidelines range.

160. *Id.*

161. *Id.* at 2200–01.

162. *Id.* at 2201.

163. *Id.*

164. *Id.*

165. United States v. Irizarry, 458 F.3d 1208 (11th Cir. 2006).

166. *Irizarry*, 128 S. Ct. at 2202.

167 *Id.* at 2203.

delay."[168] It pointed out that Irizarry's counsel might not have changed its presentation to the court, even with prior notice that the judge was considering a variance.[169] While acknowledging that the defendant or Government could potentially be surprised by a judge's factual basis for a variance sentence, "[t]he more appropriate response [in that situation] is not to extend the reach of Rule 32(h)'s notice requirement categorically, but rather for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial."[170] The Court concluded that applying Rule 32(h) to variance sentences would "complicate rather than . . . simplify" the sentencing process, and placed its faith in district judges and counsel to address all relevant matters before sentencing.[171]

Justice Breyer delivered the dissent. He challenged the majority's distinction between a variance and a departure, noting that the terms have been used interchangeably, and even cited the dictionary.[172] While acknowledging that Rule 32(h) was written before *Booker*, with only departures from the Guidelines in mind, he argued that "the language of a statute or a rule, read in light of its purpose, often applies to circumstances that its authors did not then foresee."[173]

Next, Justice Breyer examined the larger policies behind the *Burns II* holding, noting that the decision was "principally based . . . upon Rule 32's requirement" that parties receive opportunity to comment on matters relating to their sentence.[174] Furthermore, he argued that the *Burns II* goals of encouraging "focused, adversarial resolution" of sentencing issues still applied to defendants' rights under Rule 32 today.[175]

With these goals in mind, Justice Breyer emphasized a purported flaw in the majority's reasoning. The majority emphasized the narrow grounds on which departures could previously be granted, comparing that with the expanded reasons for imposing a variance sentence post-*Booker*. Therefore, Justice Breyer opined that if "*Booker* expanded the number of grounds on which a district court may impose a non-Guideline [variance] sentence, that would seem to be an additional argument *in favor of*, not *against*, giving the parties notice of the district court's intention to impose a non-Guideline sentence for some previously unidentified reason."[176]

Finally, the dissent rejected the majority's concerns that a notice requirement would result in unmanageable delays and complications.[177] Justice Breyer noted that courts could even use Rule 32(d)(2)(F) to require that

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168 *Id.*
169 *Id.*
170. *Id.*
171. *Id.* at 2203–04.
172. *Id.* at 2204–05 (Breyer, J., dissenting).
173. *Id.* at 2205.
174. *Id.*
175. *Id.* at 2206.
176. *Id.* He advocated this rationale on the basis that it would provide the "focused, adversarial" litigation that *Burns II* envisioned. *Id.*
177. *Id.* at 2206–07.

presentence reports address the appropriateness of a sentence under the factors in § 3553(a), which would "likely eliminate" the possibility that a judge would impose a variance on a previously unidentified ground.[178]

IV. EVEN AFTER *IRIZARRY*, DISTRICT COURTS SHOULD GIVE NOTICE UNDER RULE 32(H) TO DEFENDANTS RECEIVING VARIANCE SENTENCES

By deciding *Irizarry* the way it did, the Supreme Court failed to ensure that its goals in *Burns II* would be continuously met, and denied defendants an efficient, accurate opportunity to discuss their sentence with the judge who would decide their fate. Specifically, the *Irizarry* court was wrong because it: (1) failed to acknowledge the continuing importance of the Guidelines in sentencing procedure; (2) exaggerated the differences between departure and variance sentences; and (3) read the *Burns II* decision too narrowly, ignoring the broad policies behind the case and their continuing applicability.

Luckily, *Irizarry* did not end the discussion over best practices for district courts imposing sua sponte variance sentences under the mandatory Guidelines. While resolution of a circuit split often means that the "losing" side of the split must change its policies,[179] the *Irizarry* decision does not order that any federal court alter its sentencing procedure. The decision was not a mandate, or even a suggestion. Rather, it was simply a finding that Rule 32(h) did not *require* defendants to receive notice for variance sentences. Indeed, the *Irizarry* court noted that district judges should consider granting a continuance in cases where a variance was unexpected.[180] Therefore, district courts are still free to provide, or not provide, notice for variance sentences under Rule 32(h) as they see fit.

As detailed below, the clear choice is for circuits to adopt a policy of providing notice for variance sentences, although *Irizarry* held that it was not mandatory. By doing so, courts of appeals can achieve reasonable, manageable procedural equality among defendants who are sentenced under a system where the Guidelines are still a prominent factor. It makes sense to tailor sentences according to an offender's individual conduct, so disparity in the actual length of sentences is justified. Even so, there is no good reason for defendants to receive varying procedural opportunities when all are convicted under the same (federal) system.

The courts of appeals can best achieve procedural equality by adopting a uniform policy of giving notice before imposing a sua sponte variance sentence. The Supreme Court acknowledged a continuing need for advance notice when the factual basis for a defendant's sentence comes as a surprise.[181] This indicates that

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178. *Id.* at 2207.

179. For example, after *Burns I*, courts that were not providing advance notice to defendants before making a departure from the Guidelines had to change their policies to allow for now-required advance notice.

180. *Irizarry*, 128 S. Ct. at 2203–04 (placing "confidence in the ability of district judges . . . to make sure that all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made").

181. *Id.* at 2203.

some courts will continue to provide notice when they individually determine that a party's claims of prejudicial lack of notice are "legitimate."[182] Courts are likely to apply these standards arbitrarily. The only way to avoid the new problems that this fuzzy standard will create is to provide notice in *all* circumstances. Additionally, there are several specific reasons why it is better to do so.

A. Whether It Is a Departure or a Variance, the Guidelines Still Serve a Role in Every Sentencing Determination

More than one circuit has emphasized the lessened importance of the Guidelines after *Booker* as part of the reasoning that Rule 32(h) does not apply to variance sentences.[183] However, the Guidelines are still an imperative part of the sentencing procedure. As part of my research, I interviewed Judge Cindy Jorgenson of the District of Arizona. She revealed that in her district, the court still makes calculating the Guidelines its first step.[184] Furthermore, if Judge Jorgenson disagrees with imposition of a sentence within that range, she will first try to frame the determined sentence as a departure.[185] Only if those two avenues fail will she resort to sentencing a defendant outside the Guidelines, or utilizing a variance.[186]

Furthermore, many of the courts that previously held that notice was still required under Rule 32(h) seemed to employ calculation of the Guidelines as a principal step in the sentencing process.[187] This is correct for two reasons. First, the Guidelines are still listed as a point of consideration in 18 U.S.C. § 3553(a)(4)(A)(i). Second, a careful reading of *Booker* supports this conclusion.

As evidenced in *Booker*, the *Irizarry* Court abandoned its somewhat reassuring stance towards the Guidelines' continuing role. While excising the mandatory portions of the Sentencing Act, the Court spent considerable time highlighting the Guidelines' unchanged ability to serve their initial goals.[188] The

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182. *See id.*; *see also* United States v. Vega-Santiago, 519 F.3d 1, 8 (1st Cir. 2008) (Torruella, J., dissenting) (arguing that the majority's standard, similar to that proposed in *Irizarry*, would "inevitably lead to interminable litigation as to what a 'competent and reasonably prepared counsel' would have anticipated").

183. *E.g.*, United States v. Mejia-Huerta, 480 F.3d 713, 722–23 (5th Cir. 2007) (stating that "sentencing courts need only consider the Guidelines as informative," and noting that the Guidelines do not occupy the same position now that they are advisory); United States v. Vampire Nation, 451 F.3d 189, at 196 (3d Cir. 2006) ("[T]he Guidelines are now only one factor among many which can influence a discretionary sentence.").

184. Interview with Judge Cindy Jorgenson, Dist. Judge, U.S. Dist. Court, Dist. of Ariz., in Tucson, Ariz. (Nov. 21, 2007).

185. *Id.*

186. *Id.*

187. *E.g.*, United States v. Anati, 457 F.3d 233, 236–37 (2d Cir. 2006) (finding that a variance and a departure are similar where "both forms of sentencing start with a calculated Guidelines range"); United States v. Davenport, 445 F.3d 366, 370 (4th Cir. 2006) (stating that under the advisory Guidelines, a court must still calculate the correct range, determine whether a sentence within that range serves the § 3553(a) factors, and impose a variance only if it does not); United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006) (noting the Guidelines' continuing role as a "starting point" in sentencing).

188. United States v. Booker, 543 U.S. 220, 264–65 (2005).

Court acknowledged Congress's "initial and basic sentencing intent," where fairness and certainty were valued, and unwarranted disparities were not.[189] The new system, "while lacking the mandatory features that Congress enacted," would keep the other features that furthered congressional objectives.[190] It would do so by retaining the Sentencing Commission and leaving its duties unchanged, and continuing to require that district courts "consult [the] Guidelines and take them into account when sentencing."[191]

The system envisioned by the *Booker* court required the Guidelines to maintain a role of importance. Then, sentencing would continue to move "in Congress's preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences when necessary."[192] Far from downplaying the Guidelines' importance, the *Booker* decision seems more like a reminder to district courts that they still had to consider, and use, the Guidelines whether or not they were advisory. This hardly smacks of an attempt to facilitate great change in the entire procedure surrounding the Guidelines. Notice under Rule 32(h) was one of the hallmarks of the mandatory Guidelines procedure, and the *Booker* Court's implicit message that the new system would serve the same goals as the old one implies that the *Booker* court would have shied away from the destruction of this safeguard.

B. There Is No Real Difference Between a Variance and a Departure

After *Booker*, the U.S. courts of appeals frequently distinguished a variance sentence from a Guidelines departure.[193] While a departure can only occur in "narrow and specifically defined circumstances," a variance can occur whenever the judge looks at the calculated Guidelines range and determines that it does not fit the crime.[194] The judge may then impose a more appropriate sentence using the § 3553(a) factors.[195] The circuits that disfavored the requirement of Rule 32(h) notice after *Booker* implied that judges have more latitude to impose a variance now, whereas departures were rarely available under the mandatory

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189. *Id.* at 264.

190. *Id.*

191. *Id.*

192. *Id.* at 264–65.

193. *E.g.* United States v. Mejia-Huerta, 480 F.3d 713, 721 (5th Cir. 2007) (stating that a variance is a "third sentencing option" after the *Booker* decision).

194. *See* United States v. Walker, 447 F.3d 999, 1005 (7th Cir. 2006); United States v. Vampire Nation, 451 F.3d 189, 196 (3d Cir. 2006) ("Rule 32(h) was adopted at a time when courts could only avoid a Guidelines range by departing from the Guidelines. . . . What has changed post-*Booker*, is that sentencing is a discretionary exercise, and now includes a review of the factors set forth in § 3553(a).").

195. *See Mejia-Huerta*, 480 F.3d at 721 (the reasons for imposing a variance "must be consistent with the factors enumerated in § 3553(a)"); United States v. Hawk Wing, 433 F.3d 622, 625–26 (8th Cir. 2006) (variance sentence imposed after consideration of § 3553(a) factors, including the need for the sentence to "promote respect for the law and to provide just punishment for the offense"); United States v. Irizarry, 458 F.3d 1208, 1212 (11th Cir. 2006) ("the district court must consider the factors expressly set out in section 3553(a)" when sentencing).

Guidelines regime.[196] However, a variance is really not that different from a departure. There were not necessarily only limited circumstances where a court could depart under the mandatory Guidelines regime. Nevertheless, the Supreme Court thought so.[197]

Before *Booker* excised this provision, § 3553(b)(1) directed courts to impose a sentence within the Guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[198] It is incorrect to say that under the mandatory Guidelines scheme, courts could only depart in limited circumstances because there is a catch-all provision providing for departures due to any factor the judge deems relevant.[199] Furthermore, the Guidelines themselves recognize that Congress cannot think of all possible reasons for a departure, so some discretion should be left to the courts.[200] This gives judges much more autonomy to consider departures for a variety of circumstances, whether under the mandatory or advisory Guidelines scheme.[201] Instead of treating

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196. *See, e.g.*, *Walker*, 447 F.3d at 1005 (emphasizing that under the mandatory Guidelines scheme, a court departed when it "invoked the very limited discretion . . . to sentence outside the applicable Guidelines range where one of the specified circumstances was found to exist"). However, at least one circuit that mandates advance notice for variance sentences reached that same conclusion. United States v. Anati, 457 F.3d 233, 237 (2d Cir. 2006) (stating that in comparison to a departure, a variance "results from a somewhat broader opportunity to sentence above or below that range based on a consideration of the factors outlined in section 3553(a)"). While this observation may be true, it does not disrupt my contention that the ultimate reasons for imposition of a departure or a variance are not that different.

197. Irizarry v. United States, 128 S. Ct. 2198, 2202 (2008) (noting that pre-*Booker* departures could only be made in "narrowly defined circumstances" and holding that "[a]ny expectation subject to due process protection at the time we decided *Burns* [*II*] that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive" *Booker*). *But see id.* at 2206 (Breyer, J., dissenting) (noting that courts have always been free to depart from the Guidelines, and that the Guidelines themselves indicate that there is broad authority to depart from them).

198. 18 U.S.C. § 3553(b)(1) (2003).

199. *See* United States v. Wells, 163 F.3d 889, 899 (4th Cir.1998) (finding that departure based on domestic terrorism activities was warranted even though there was no specific departure provision of the Guidelines authorizing it). The court held that "the catch-all provision of the Guidelines is certainly broad enough to allow such consideration." *Id.*

200. Prior to amendment, the U.S. Sentencing Guidelines Manual read "[c]ircumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance." U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2000).

201. Aside from the catch-all provision, the Guidelines permit upward departures for a long list of reasons. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.14 (2008) (where the public welfare was significantly endangered); *id.* § 5K2.8 (if there was extreme conduct such as torture or prolonging of pain); *id.* § 5K2.2 (if serious physical injury resulted). Similarly, there are innumerable reasons for a court to depart downward. *See, e.g.*, *id.* § 5K2.16 (downward departure authorized for voluntary disclosure and acceptance of responsibility); *id.* § 5K2.12 (downward departure possible if defendant committed the crime under duress or blackmail not amounting to a complete defense).

departures as a rare happening for a judge under the mandatory Guidelines scheme, the Supreme Court should have acknowledged that they both can, and do, arise from a wide range of circumstances.[202]

Moreover, the permissible grounds for a departure under the Guidelines and those bases for a variance under 18 U.S.C. § 3553 are not entirely dissimilar. In 2006, the top reason for a variance in excess of the Guidelines after *Booker* was the nature and circumstances of the offense or the history of the defendant.[203] The top reason for upward departures was criminal history issues.[204] Other reasons for variances included protection of the public from further crimes, desire to reflect the seriousness of the offense and promote respect for the law, and criminal history issues (also the top reason for imposing a *departure*).[205] Additional rationales for upward departures included general aggravating circumstances, public welfare, and extreme conduct.[206] Overall, differences between common justifications for departures and variances seem minimal. Indeed, criminal history issues are listed as a prominent reason for giving defendants both departure and variance sentences. There is little difference between imposing an upward departure to protect the public welfare and imposing a variance to protect the public from further crimes. Furthermore, sentencing a defendant above the Guidelines to reflect the seriousness of the offense seems the same as giving that same defendant an upward departure sentence for aggravating circumstances of his or her crime. If anything, the difference between the two is only a reflection of the language of § 3553.[207]

Additionally, caselaw fails to illuminate a glaring distinction between a departure and a variance. Courts have upheld both variances and departures based

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202. For example, post-*Booker*, at least one court that abandoned the notice requirement of Rule 32(h) upheld a variance sentence based on the defendant's past conduct and unlikelihood of recidivism. *See* United States v. Hawk Wing, 433 F.3d 622, 625–26 (8th Cir. 2006) (upward departure upheld where the district court felt that the defendant could not "be deterred from further criminal conduct" due to past history and alcoholism). Similarly, the Sentencing Guidelines allow for an upward departure "if reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S. SENTENCING GUIDELINES MANUAL § 4A1.3. The reasons for the variance under the advisory Guidelines system, or the departure under the mandatory Guidelines system, seem clearly similar.

203. UNITED STATES SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 68 (2006). Three hundred eleven defendants (out of 455 total who received an upward variance) were sentenced above the Guidelines range due to this factor. *Id.*

204. *Id.* at 66–67.

205. *Id.* at 68.

206. *Id.* at 66–67.

207. Among others, the § 3553(a) factors to be considered when imposing a variance include "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," and "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(A), (C) (2006).

on the criminal history of the defendant,[208] the effect of the defendant's crime on the larger public,[209] and the heinous nature of the crime.[210]

If variances and departures are not that different, why should only one require advance notice? Many sentences can probably be characterized as a variance or a departure, depending on the acceptability of variances in the district and the judge's preference. It defies logic to afford defendants significantly more procedural opportunities under one than the other. Therefore, advance notice should be required for defendants, whether the judge is considering a variance or departure.

C. The Concerns That Prevailed in the Burns II *Holding Are Still Relevant in a Post-*Booker *Era*

The concerns that the Supreme Court sought to allay in *Burns II* are still present after the *Booker* decision, and the *Irizarry* court largely ignored them. Mainly, the *Burns II* court sought to (1) reduce the element of surprise that comes with a sua sponte departure and (2) allow defendants an opportunity to comment on the legal and factual issues surrounding their sentences.[211]

1. The Element of Surprise

After *Booker*, some non-notice circuits held that the element of surprise no longer existed because parties were on inherent notice that the Guidelines did not bind the judge.[212] Furthermore, some argued that the defendant was aware of the judge's authority to use the § 3553(a) factors in sentencing, and could direct his or her pre-sentencing arguments accordingly.[213] Nevertheless, the § 3553(a)

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208. *See, e.g.*, United States v. Solis-Bermudez, 501 F.3d 882, 887 (8th Cir. 2007) (upholding upward variance due to defendant's repeated deportation and illegal re-entry, as well as his criminal background); *see also* United States v. Donelson, 450 F.3d 768, 774 (8th Cir. 2006) (upholding departure based on criminal history, including the nature of the crimes and recidivism).

209. *See, e.g.*, United States v. Archambault, 344 F.3d 732, 735 (8th Cir. 2003) (upholding upward departure because, among other things, the defendant's crime "significantly interrupted a governmental function"); *see also* United States v. Mejia-Huerta, 480 F.3d 713, 716 (5th Cir. 2007) (upward variance for several reasons, including the defendant's threat to the public safety, affirmed based on § 3553(a) factors).

210. *See, e.g.*, United States v. Gore, 298 F.3d 322, 326 (5th Cir. 2002) (declining to find plain error where the district court plausibly made an upward departure based on U.S.S.G. § 5K2.8, which allows departures for extreme cruelty); *see also* United States v. Sitting Bear, 436 F.3d 929, 935 (8th Cir. 2006) (upholding variance where the defendant's four-year-old child was tortured for a prolonged period of time prior to his death).

211. Burns v. United States (*Burns II*), 501 U.S. 129, 135–37 (1991).

212. United States v. Walker, 447 F.3d 999, 1007 (7th Cir. 2006); United States v. Irizarry, 458 F.3d 1208, 1212 (11th Cir. 2006).

213. *Mejia-Huerta*, 480 F.3d at 722 (unfair surprise no longer present because the § 3553(a) factors are "knowable" by both parties prior to sentencing, and everyone is aware that the district court can consider any of them); United States v. Vampire Nation, 451 F.3d 189, 196 (3d Cir. 2006).

factors are extremely broad.[214] Sometimes, a judge interprets them in unanticipated ways. In *United States v. Anati*, the district court judge referred to several § 3553(a) factors while imposing an upward variance because of "the deleterious impact of heroin in our communities which, in my opinion, is even more serious than cocaine."[215] In *United States v. McClung*, despite the Government's acceptance of the Guidelines sentencing range, the district court imposed an upward variance because the defendant's extortion scheme was "elaborate" and "well thought-out" and affected "the most economically disadvantaged counties in West Virginia."[216] Additionally, the district court considered McClung's high-ranking public position and observed that a harsher sentence might deter others in similar positions.[217]

The argument that parties are on inherent notice post-*Booker* begs the question: inherent notice of what? Are the parties on inherent notice that the district court might arbitrarily apply the § 3553(a) factors? As earlier cases demonstrate, there is no way to anticipate some of the reasoning made by district courts. A defendant can still be surprised by hearing for the first time at sentencing that the district court has increased his or her sentence beyond the Guidelines because the broad contours of § 3553(a) allow multiple interpretations. Furthermore, a variance sentence is still rare,[218] and a defendant still enters sentencing with a thorough presentence report and review of the case by all parties. A defendant still might legitimately expect, whether before or after *Booker*, that he or she will know about any objections to a Guidelines sentence beforehand because the Government or presentence report will have indicated the grounds for one. Therefore, rendering the Guidelines advisory did not eliminate the surprise that the *Burns II* court originally sought to appease.

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214. Among other requirements, § 3553(a) directs a judge to consider: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; (3) the types of sentences available; (4) the need to avoid sentencing disparities; (5) the need for the sentence to provide deterrence; and (6) the need to protect the public from a defendant's further crimes. 18 U.S.C. § 3553(a) (2006). Indeed, while holding that notice is not required for post-*Booker* variances, the *Vampire Nation* court seemingly admitted the expanded range of possible grounds for sentencing—so why is there less surprise about a judge's reasons for varying from the Guidelines? *See Vampire Nation*, 451 F.3d at 196 (noting that while pre-Booker departures were "constrained by the provisions of the Guidelines pertaining to departures," the Guidelines "no longer limit the grounds a court can consider at sentencing" and are "one factor among many which can influence a discretionary sentence").

215. 457 F.3d 233, 235 (2d Cir. 2006) ("Judge Townes referred to several section 3553(a) factors including 'the nature and seriousness of the offense,' 'the history and character of the defendant,' and 'the need for punishment and deterrence.'").

216. 483 F.3d 273, 275 (4th Cir. 2007).

217. *Id.*

218. Interview with Judge Jorgenson, *supra* note 184.

2. The Opportunity to Argue Any Disputed Factor Important to a Defendant's Sentencing Determination

Additionally, the *Burns II* goal of allowing parties the opportunity to comment on the legal and factual issues surrounding their sentences mandated a continuing notice requirement for variances that the *Irizarry* decision fails to provide. *Burns II* required that advance notice of a sua sponte departure include the specific grounds on which the district court is contemplating a departure.[219] Due to the limitless potential reasons for departure, the *Burns II* court rationalized that without this specific notice, "no one is in a position to guess when or on what grounds a district court might depart, much less to 'comment' on such a possibility in a coherent way."[220] With its specific notice requirement, the *Burns II* court narrowed down the possible grounds for a departure. If the *Irizarry* court had followed suit and required advance notice for variances, it would have served the same goal.

Again, the factors under § 3553(a) are extremely broad and open to multiple interpretations. Now that the federal courts are not required to give advance notice of the specific grounds that a judge is considering for a variance, one result that the *Burns II* court sought to avoid will probably become reality. It feared that without imposing a notice requirement, "parties [would] address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative."[221]

Last, the *Irizarry* Court also failed to remember that the *Burns II* decision was based on the Supreme Court's desire to reflect legislative intent in the enactment of Rule 32.[222] The *Burns II* Court began its analysis by reviewing what was then Federal Rule of Criminal Procedure 32(a)(1), which afforded parties the "opportunity to comment upon . . . other matters relating to the appropriate sentence."[223] The Court concluded that it was senseless to determine that Congress wanted the defendant to have the right to comment, without the additional right of notification that the court was contemplating a sentence above the Guidelines.[224]

The same provision affording parties the right to comment on sentencing matters is still present in Rule 32.[225] The possibility of an upward variance is a sentencing matter for the same reasons that an upward departure is. The two should not be treated any differently. By declining to extend Rule 32(h) to variances, the Supreme Court failed to look at why *Burns II* was decided the way it was and to understand that an advisory Guidelines system would not take away the concerns that animated the *Burns II* decision. Without advance notice in both

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219. Burns v. United States (*Burns II*), 501 U.S. 129, 138–39 (1991).
220. *Id.* at 137.
221. *Id.*
222. *Id.* at 136–37.
223. *Id.* at 135.
224. *Id.* at 135–36.
225. The provision is now codified as Federal Rule of Criminal Procedure 32(i)(1)(C).

situations, a "critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines."[226]

D. The Benefits of a Notice Requirement Outweigh Concerns of Judicial Inefficiency or Lack of Neutrality

Imposing a notice requirement for variances is not burdensome.[227] Several other circuits have already done so,[228] and the percentage of variances is small compared to the total number of defendants who are sentenced.[229] In fact, providing advance notice might make the sentencing process more efficient by ensuring that "issues with the potential to impact sentencing" are given early attention.[230] This way, a defendant will not waste time arguing factors that will not be used, or which are not important to the district court. *Irizarry*'s indication that courts may still consider granting continuances in cases of potential unfair surprise suggests the possibility of more litigation over what circumstances warrant the discretionary extra time. If all courts employ a notice requirement every time, this possibility would not become an issue.

Additionally, concerns that the advance notice clashes with principles of judicial neutrality are unfounded.[231] In fact, giving a defendant advance notice may ultimately help ensure a result that is careful and unbiased. Furthermore, judges have had access to ample case information prior to the sentencing hearing—certainly enough to have established an informed preliminary view of "what the appropriate sentence is, including its length."[232] While it does force the defendant to hear where the judge preliminarily stands,[233] one must not lose sight of what advance notice does—it gives a defendant the right to point back to the

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226. *Burns II*, 501 U.S. at 137.

227. The *Vega-Santiago* court disregarded the need for a "mechanical requirement" of notice, stating that a competent lawyer should anticipate the outcome of the sentencing hearing based on the information available beforehand: the trial, presentence report, and prior exchanges of the parties. United States v. Vega-Santiago, 519 F.3d 1, 5 (1st Cir. 2008). However, the same court acknowledged that district courts must consider the § 3553(a) factors as part of the post-*Booker* sentencing process, which are "phrased in very general terms." *Id.* at 4.

228. *See* cases cited *supra* note 101.

229. *See supra* note 205 and accompanying text.

230. United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006).

231. Irizarry v. United States, 128 S. Ct. 2198, 2203 (2008) ("[G]iven the scope of the issues that may be considered at a sentencing hearing, a judge will normally be well-advised to withhold her final judgment until after the parties have had a full opportunity to present their evidence and their arguments."); *see also* Thomas Gilson, Note, *Federal Sentencing Guidelines—The Requirement of Notice for Upward Departure*, 82 J. CRIM. L. & CRIMINOLOGY 1029, 1047–49 (1992) (arguing that the *Burns II* notice requirement "clashe[d] with fundamental principles of judicial neutrality").

232. *Vega-Santiago*, 519 F.3d at 12 (Lipez, J., dissenting) (noting that prior to the sentencing hearing, judges will have had access to the presentence report and other materials).

233. *See id.* at 4–5 (majority opinion) (citing concern that a judge will have to identify a possible ground for variance out of the "broad, open-ended and discretionary" § 3553(a) terms before hearing the full presentation at the sentencing hearing).

presentence report and argue that its conclusion was correct, or provide any further information necessary to change the court's mind. This can be done much more efficiently if the defendant knows the specific grounds that formed the district court's opinion to date. If the district judge changes his or her mind after hearing arguments in response to its announcement that it may utilize a variance sentence, it does not necessarily mean that it made a mistake earlier. Instead, it indicates that the factors considered by the judge were subject to the same amount of discussion as they would be if the presentence report or Government first brought them up.

E. Refusal to Give Notice Violates the Spirit of Booker

The *Booker* opinion reflected a continuing level of respect for the Guidelines and a desire to maintain them in some form. That may be why the Court chose to render them advisory, instead of eliminating them altogether.[234] The Court's decision in *Booker*, like that in *Burns II* and many others, was driven by the need to adhere to constitutional standards while reaching a result consistent with Congress's visions.[235] Indeed, the *Booker* Court severed and excised the mandatory Guidelines provisions because it determined that Congress would not have intended the Sentencing Reform Act to stand had it been faced with the constitutional jury trial requirement that the Court applied in *Booker*.[236]

Booker sought to invoke only limited change, and it did not expressly overrule *Burns II*. The *Booker* Court stated its desire for the remaining system to continue meeting congressional goals by reducing sentencing disparity while still allowing for individualized sentences.[237] Furthermore, the Court noted that it could "find no feature of the remaining system that tends to hinder, rather than to further, these basic objectives."[238] Clearly, the Court sought to retain the Guidelines and the Sentencing Reform Act's provisions as much as possible. Therefore, understanding the *Booker* decision as limiting the application of an earlier Supreme Court holding is inconsistent with that purpose.

The *Irizarry* decision brings a more drastic change than the Supreme Court intended with its *Booker* decision. The theme of the *Booker* opinion seems to be adherence to constitutional requirements, coupled with a desire to change sentencing procedure as little as possible. As noted above, the Court designed the *Burns II* decision to include deference to Congress, and to not render "meaningless" Congress's intent in creating Rule 32.[239] *Booker* continues in the same vein, but the *Irizarry* Court's decision to reject a notice requirement for sua sponte variances seems to move in the wrong direction from what the *Booker* Court determined Congress would have wanted.

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234. *See* United States v. Booker, 543 U.S. 220, 249 (2005) (deciding to excise the Sentencing Reform Act provisions making the Guidelines mandatory, instead of completely invalidating the Act).

235. *Id.* at 265 (noting that while Congress's intent to provide a mandatory Guidelines system is not a constitutional "choice that remains open," the Court intended to determine congressional intent in light of its holding).

236. *Id.*

237. *Id.* at 264–65.

238. *Id.*

239. Burns v. United States (*Burns II*), 501 U.S. 129, 136 (1991).

CONCLUSION

After *Irizarry*, the U.S. courts of appeals maintain the opportunity to follow the goals of the *Burns* decision and to provide defendants with fair notice of sentence variances. The Judicial Conference of the United States can also take action by revising the Federal Rules of Criminal Procedure to suggest that advance notice be given for sua sponte variance sentences. *Irizarry* should not be, and does not have to be, the last word on procedural opportunities for post-*Booker* sentencing.

Before variances were an option, the *Burns II* Court concluded that "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure."[240] After *Booker* and *Irizarry*, defendants and their attorneys in some jurisdictions must anticipate the limitless Guideline departure factors, *and* the countless ways that a judge could broadly apply the § 3553(a) factors to a variance. *Booker*'s advisory Guidelines scheme made the *Burns II* and Rule 32(h) safeguards more—not less—important. With the increased rate of variance sentencing, *Burns II*'s order of advance, specific notice to defendants possibly subject to a sua sponte departure makes even more sense now.[241]

240. *Id.*

241. *See id.* at 138–39; U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 46 (2006), *available at* http://www.gov/booker_report/booker_report.pdf.