

## *A Short Essay on Booker as a Thought Experiment for District Judges*

The Supreme Court's Booker decision is obviously important for the impact it has and will have on federal sentencing practices. But, I believe that Booker is far more important to the jurisprudence of judging than it is to sentencing law. Booker grants district judges a fleeting, once-in-a-lifetime chance to learn something terribly important to judging.

To explain myself, a word about thought experiments is appropriate. "Real" experiments are frequently expensive and impossible to perform. Thus, scientists and philosophers sometime use "thought experiments" to learn something valuable about the things they study by posing and then answering a hypothetical problem in a rigorous way. They think hard on a problem, give visual shape to it, and then put the image through its paces in a particular but pristine situation. They observe what happens, and are almost always surprised.

Einstein gave us a useful example. It involves two men, both physicists. It also involves two ideas, gravity and acceleration. The mythical scientist posits that either gravity or acceleration tethers us to the earth's surface. Lacking the ability to test the question empirically, the investigator conducts the following thought experiment to test the idea:

The first physicist has all the necessary equipment for measurement. That physicist is inside a moving elevator, but he has no means of looking outside it. In fact, the good doctor has never been outside the moving elevator. The physicist knows he is in a three-dimensional space, and can only walk on one side of that space, that is, the floor. He wants to figure out the cause of this oddity and, using his instruments, measures and calculates, and decides, quite properly, that the force of gravity is responsible.

The second physicist is outside the elevator, and he is observing the moving elevator. He notices that the elevator is accelerating rapidly through space, and determines that all the objects inside the elevator will be propelled to the end opposite the direction of acceleration. Quite correctly, the second doctor attributes this phenomenon to the force of acceleration.

Einstein's elegant experiment proved that both men are right if we judge their answers relative to their perspective. From inside, the force of gravity is responsible. From outside, the force of acceleration is responsible. Neither idea—gravity nor acceleration—is more or less true. They are both part of a system and must be integrated into a theoretical structure for the ideas to have real meaning.

Now, off the elevator, and back to earth. We inferior-court judges almost never have the opportunity to freely examine the principles we apply. We are compelled by statutes, constitutions and prior cases to adopt and enforce theories that others have imposed upon us. But, now, along comes Booker. It tells us that the laws we have followed for more than a decade are “advisory” and we should act “reasonably.”

Essentially, Booker instructed sentencing judges to think about theory. And that brings me back to thought experiments, and the point of this musing.

Until Congress, the Commission and the Courts of Appeal step in to take away the opportunity, we should try our own “thought experiments” and put ourselves both within and without Einstein’s elevator every time we sentence someone. In each case, by trying out any number of hypothetical sentences before we settle on one particular judgment, let us rationally and rigorously examine the utility of the principles we are using inside the three dimensions of our courtrooms, while also realizing that our decision and the principles which animate it are a part of, and must be squared with, a much larger universe.

If we exercise this exacting and exhausting discipline, and eschew meaningless juridical cant, we have a unique opportunity to learn a principle far more important to judging than some disconnected notion of justice. We will almost certainly learn that the creation of a coherent legal theory—whether it pertains to sentencing or civil rights—requires an intellectual humility not often found in life-tenured federal district judges.

*Richard G. Kopf*  
*United States District Judge*  
*Sunday, February 20, 2005<sup>1</sup>*

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<sup>1</sup>On this day, Hunter Thompson killed himself and Sandra Dee died of old age, proving, I suppose, the unified field theory of karma: Gidget always trumps Gonzo.