

## EDITOR'S OBSERVATIONS

### Perspectives on *Booker's* Potential

**DOUGLAS A. BERMAN**

FSR Editor and William B. Saxbe Designated Professor of Law at the Ohio State University Moritz College of Law

A full year after the Supreme Court's *Booker* decision<sup>1</sup> converted the federal sentencing guidelines from mandates to advice, it remains unclear whether *Booker* has dramatically altered or merely tweaked the day-to-day realities of the federal sentencing system. Though more time will be needed to assess *Booker's* full impact, there is little question that the *Booker* decision has the potential to transform federal sentencing law, policy, and practice. This Issue of FSR examines *Booker's* potential, giving particular attention to what defense attorneys believe (or at least hope) *Booker* might portend for the future of the federal sentencing system.



#### I. One View of Post-*Booker* Realities: A Culture of Guideline Compliance

Though the remarkable *Booker* decision further obscured the Supreme Court's conceptually muddled Sixth Amendment jurisprudence,<sup>2</sup> Justice Breyer's goals in the remedial portion of *Booker* seem quite clear. Influenced perhaps by his central role in the development of a federal guideline system that has always depended heavily upon judicial fact-finding,<sup>3</sup> Justice Breyer clearly sought to preserve, to the extent possible in light of the Court's constitutional holding, the fundamental pre-*Booker* features of the federal sentencing system.

In *Booker's* remedial opinion, Justice Breyer extols the value, role, and continued importance of the guidelines. Justice Breyer stresses that, even as an advisory system, the Sentencing Reform Act still "requires judges to take account of the Guidelines" and "requires judges to consider the Guidelines sentencing range,"<sup>4</sup> and the remedial opinion concludes by explaining that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."<sup>5</sup> (Of course, federal judges often must engage in extra-verdict judicial fact-finding in order to determine the guideline range that, after *Booker*, they are still expected to "consider.")

In addition to preserving a central role for the guidelines and judicial fact-finding at sentencing, Justice Breyer's remedial opinion also preserves other essential features of the pre-*Booker* sentencing system. The remedial opinion in *Booker* declares that circuit courts should continue to hear sentencing appeals as provided by the Sentencing Reform Act, although the task of appellate review gets recast into "determining whether a sentence is unreasonable."<sup>6</sup> And *Booker* describes the role of the U.S. Sentencing Commission in an advisory guidelines system as essentially unchanged: the Sentencing Commission, explains Justice Breyer, "remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."<sup>7</sup>

Yet, despite apparent efforts to preserve much of the pre-*Booker* status quo, the Supreme Court's conversion of the federal guidelines from mandatory law to advisory rules would seem to mark a dramatic turning point in the evolution of the federal sentencing system. Judicial complaints about the rigidity, complexity, and harshness of the federal guidelines were legion before *Booker*, and thus one might have expected to observe a radical transformation of federal sentencing practices and outcomes once the Supreme Court declared the guidelines advisory.

Based on a year of experience with the *Booker* remedy, however, it now appears that Justice Breyer largely succeeded in preserving the fundamental pre-*Booker* features of federal sentencing: the *Booker* decision does not appear to have radically changed either basic practices or typical outcomes in the

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federal sentencing system. Though courts have been engaged in a dynamic debate over the precise weight to be given the guidelines now that they are only advisory, this debate probably should be considered more a matter of style than substance because there is universal lower-court agreement that, after *Booker*, district judges must still properly calculate guideline sentencing ranges and must still provide a reasoned justification for any decision to deviate from the guidelines. Moreover, beyond the work of district courts, the activities of other players in the federal sentencing system have not changed significantly: probation officers are still preparing presentence reports relying on the same sources of information as before *Booker*; prosecutors and defense attorneys are still dickering over guideline application issues in plea negotiations and before sentencing courts; district courts are still relying on uncharged conduct in calculating (now advisory) guideline sentencing ranges; and appellate courts are still primarily concerned with whether guideline ranges have been properly calculated.

Indeed, a year after *Booker*, lower-court opinions and cumulative post-*Booker* data suggest that the legal and political culture has made the federal sentencing system almost impervious to dramatic change. *Booker's* muted impact on federal sentencing practices and outcomes highlights that the pre-*Booker* legal culture acclimated case-level sentencing decision makers—judges, prosecutors, defense attorneys, probation officers—to a rule-bound sentencing process that, through judicial fact-finding, resulted in significant terms of imprisonment for most federal offenders. In addition, the pre-*Booker* political culture was marked by systemwide sentencing decision makers—Congress, the U.S. Sentencing Commission, the Department of Justice—becoming astute at enforcing compliance with a rule-bound sentencing process. Consequently, a full year after *Booker*, we observe (1) a federal sentencing process that still remains exceedingly focused on guideline calculations based on judicial fact-finding, and (2) federal sentencing outcomes in which most sentences are still imposed within (now advisory) guideline ranges and most offenders are still receiving significant terms of imprisonment.

In short, a culture of guideline compliance has persisted after *Booker*. Indeed, as applied by the lower courts, the *Booker* decision appears to have only slightly mitigated the rigidity and severity of the federal sentencing system, while perhaps aggravating the system's overall complexity. These realities are borne out by a review of the post-*Booker* case law, in which a number of judges have stressed the importance of continuing to follow the guidelines in nearly all cases.<sup>8</sup> In addition, data on post-*Booker* sentencing outcomes released by the U.S. Sentencing Commission reveals only relatively small changes in the patterns of sentencing outcomes.<sup>9</sup> Commission Chair Judge Ricardo Hinojosa has recently noted that the "sentencing trends for the post-*Booker* data have remained relatively stable."<sup>10</sup> Though post-*Booker* sentencing data reveal a noticeable decline in the national average of "within range" guideline sentences,<sup>11</sup> a within-range sentence is still imposed in nearly two out of every three cases.<sup>12</sup> Moreover, as the number of below-guideline sentences has increased after *Booker*, so too has the number of above-guideline sentences.<sup>13</sup> Perhaps most critically, the Sentencing Commission's post-*Booker* data reveal that average and median sentences in all major categories of crimes are virtually unchanged from pre-*Booker* levels.<sup>14</sup> Viewed *in toto*, the Commission's data suggest that, after *Booker*, federal sentencing judges are exercising their new discretion relatively sparingly and in ways that only mildly alter the sentencing bottom line for federal defendants.

## II. Another View of Post-*Booker* Realities: An Important Shift in Approach

Though there has not been a dramatic shift in federal sentencing practices or outcomes in *Booker's* wake, the *Booker* decision still clearly has had a tangible and consequential effect on federal sentencing in some courtrooms and for some cases. This reality is evidenced most clearly through written sentencing opinions by certain district judges which stress that *Booker* demands a shift in a judge's approach to and attitudes about following the guidelines.<sup>15</sup> Especially in those cases where sentence terms suggested by the guidelines seem severe, judges are clearly prepared and often eager to make use of their new post-*Booker* discretion. A report from The Sentencing Project, which is reprinted in this Issue, documents that some crack sentencing cases reveal that sentencing after *Booker* reflects "a new methodology of judicial deliberation."<sup>16</sup> In the words of this report, at least some sentencing judges, by engaging in a form of "rational jurisprudence and thoughtful statutory interpretation," are now relying on their new post-*Booker* authority to more effectively "evaluate all statutorily prescribed factors" at sentencing.<sup>17</sup>

Though these cases and other written decisions may not provide a fully representative sample of post-*Booker* work in the district courts, they do suggest that *Booker* has at least prompted an important change in the sentencing decision making of some judges. Indeed, these decisions, along with anecdotal reports from persons involved in day-to-day federal sentencing proceedings, spotlight what

might be viewed as *Booker's* primary positive consequences. The *Booker* decision generally has made (or at least can make) federal sentencing decision making more balanced, transparent, and proportional by (1) improving the balance between the application of structured sentencing rules and judicial discretion; (2) improving the balance between the impact of judicial and prosecutorial discretion at sentencing; (3) improving the opportunities for district judges to exercise reasoned sentencing judgment to tailor sentences to individual case circumstances; and (4) reordering sentencing outcomes (at least slightly) so that those defendants most deserving of reduced (or increased) sentences are getting the benefits (or detriments) of expanded judicial authority to sentence outside the guidelines.

Of course, *Booker's* apparently small, but perhaps still consequential, impact on federal sentencing has not received praise from all quarters. In testimony presented at a hearing of a subcommittee of the House of Representatives a month after the *Booker* decision,<sup>18</sup> Assistant Attorney General Christopher Wray emphasized the potential for greater sentencing disparity in the wake of *Booker* and also suggested that an advisory guideline system might result in “reduced incentive for defendants to enter early plea agreements or cooperation agreements with the government.”<sup>19</sup> Similarly, in a major policy speech delivered to a conference of the National Center for Victims of Crime in June 2005, Attorney General Alberto Gonzales asserted with chagrin that, since *Booker*, there has been “an increased disparity in sentences, and a drift toward lesser sentences.”<sup>20</sup> Gonzales also warned that after *Booker* “key witnesses” may be “increasingly less inclined to cooperate with prosecutors.”<sup>21</sup>

The concerns expressed by the Department of Justice are to some extent borne out by post-*Booker* sentencing data and case law. Though there is limited evidence to directly support the suggestion that the *Booker* remedy has seriously impacted the government's ability to encourage pleas or cooperation, there is reason to be concerned about greater disparity in sentencing procedures and outcomes after *Booker*. Circuit-by-Circuit and district-by-district data document that the impact of greater judicial discretion has been spread unevenly in courtrooms across the country.<sup>22</sup> And published opinions as well as anecdotal reports reveal some significant judge-to-judge differences in the resolution of various important post-*Booker* legal and practical issues.

### III. Appreciating *Booker's* Potential: New Issues and Directions to Explore

Against the backdrop of this dynamic and debatable post-*Booker* landscape, the materials in this Issue present a number of different views, mostly from a defense perspective, on how *Booker* can and should reshape federal sentencing realities. A set of articles from federal defenders, as well as other materials relating to or implicating the work of the U.S. Sentencing Commission, explore *Booker's* potential to transform federal sentencing practices and outcomes.

Providing a useful reminder that *Booker* and its predecessors were fundamentally about sentencing procedures and defendants' procedural rights, an article by federal defenders Alan DuBois and Anne Blanchard discusses how courts can use their new discretion under *Booker* to “improve the accuracy and reliability of fact-finding at . . . the sentencing hearing.” This article emphasizes what it calls the “cornerstones of a fair sentencing process” and provides a thoughtful overview of some procedural innovations that at least a few district courts have adopted after *Booker*.

Federal defender Timothy Cone explores how *Booker's* “change in the source of judicial sentencing authority affects the validity of plea agreements” in which the parties jointly recommend the imposition of a guideline sentence. Cone argues that “*Booker* waivers” should be seen as suspect “because they undermine the vital exercise of judicial sentencing discretion” and can be inconsistent “with the Sentencing Reform Act, with *Booker's* Sixth Amendment holding, and with the separation of powers doctrine.” In addition, federal public defenders Jon Sands and Robert McWhirter explore in a fascinating article the intersection of *Booker* and its predecessor *Blakely v. Washington* for cases in the federal system in which state and federal sentencing law intertwine. Highlighting the complicated interplay between *Booker* and *Blakely*, this article notes that, despite the *Booker* remedial holding, in a few federal cases certain facts important at sentencing will have to be alleged in an indictment and proved at trial. Sands and McWhirter suggest that these cases might show that providing defendants with broader procedural rights at sentencing is not as problematic as some have suggested.

Discussing the broader post-*Booker* sentencing landscape, a long and detailed letter from the Federal Defenders to the U.S. Sentencing Commission reprinted in this Issue sets forth an array of suggestions for how *Booker* can and should prompt change in the federal sentencing system. Filled with important data and recommendations, this letter provides a remarkably refined account (from a defender perspective) of where federal sentencing now stands and should be

headed after *Booker*, and it sensibly shifts the post-*Booker* focus from the work of the courts to the work of the Commission.

The importance of the Sentencing Commission's work in the post-*Booker* era is reinforced by other materials reprinted in this Issue. For example, the transcript from a panel discussion involving District Judges Paul Friedman and Nancy Gertner, as well as then-Judge (now Justice) Samuel Alito, documents all the uncertainties that courts and policy makers face in the wake of *Booker*. Sponsored by the Constitution Project and taking place a few months after *Booker*, this panel discussion is full of knowledgeable and insightful comments by judges trying to make sense of *Booker* "on-the-ground." This transcript not only reveals the enduring uncertainty about lawful and appropriate sentencing laws and procedures after *Booker*, but also reinforces that the Commission must play a central role assessing and resolving the many questions raised by the operation of an advisory federal sentencing guideline system.

In this Issue we also reprint two documents that highlight the strong work that can be done by a sentencing commission and others through the assembly and analysis of sentencing rulings and data. As mentioned before, we reprint in this Issue a report from the Sentencing Project analyzing post-*Booker* sentencing through a close look at major decisions in crack cocaine cases. Though only examining a tiny (and perhaps not fully representative) slice of the federal sentencing system, this report provides essential perspectives into one significant (and long controversial) facet of the post-*Booker* sentencing world and also highlights the insights to be garnered from a close review of one sentencing "hot spot."

Relatedly, we also reprint here an abridged version of a recent important report from the New Jersey Commission to Review Criminal Sentencing, which urges reforms to the state's drug sentencing laws and, in particular, the state laws creating "drug-free zones." The report explains in thoughtful detail why New Jersey's "Drug Free Zone" laws are not fully effective and why minorities are far more likely to be arrested and convicted under these laws and therefore sentenced to longer terms of imprisonment than their white suburban and rural counterparts. The New Jersey report serves as an example of the power of data and sound policy making over political rhetoric, and also as an example of the important work that expert sentencing commissions can do to address and help transform problematic sentencing issues.

#### IV. Conclusion

Though answering the most basic questions about the guidelines' status as a result of its *Blakely* ruling, the Supreme Court in *Booker* ultimately raised more questions than it answered concerning the day-to-day particulars of operating an advisory sentencing guideline system. Consequently, perhaps the only certainty after *Booker* is the inevitability of lots of lower-court litigation trying to work out the challenging kinks of transforming a mandatory sentencing system into an advisory one.

Critically, though, the short-term mess of litigation should not eclipse *Booker's* long-term potential for the federal sentencing system. Justice Breyer's remedial opinion, by emphasizing the provisions of section 3553(a) and essentially demanding a sentencing process focused on the exercise of reasoned judgment by federal judges, creates by judicial fiat a sentencing system that looks like the idealized guideline system that early advocates of guideline reform sought by enabling the development of a purpose-driven "common law of sentencing."<sup>23</sup> *Booker* requires district and appellate courts to focus on the provisions of section 3553(a), which means that judges now can and must give more sustained attention to the broader goals of sentencing reform that Congress incorporated into the Sentencing Reform Act. In addition, the transformation of the guidelines from mandates into advice provides the U.S. Sentencing Commission with a remarkable opportunity to improve and simplify key facets of the guideline system without undue concerns about ex post facto doctrines and other issues that could have previously thwarted reform initiatives.

Of course, *Booker's* potential will be wasted if judges and the Sentencing Commission continue to cling to the existing guidelines like a security blanket. It seems that some judges and members of the Sentencing Commission, perhaps all too aware of Congress's recent sentencing reform track record, are still embracing and even extolling the current guidelines out of fear that Congress might overreact to any efforts to bring more humanity to sentencing decision making. But, rather than be stifled by such an understandable but unhealthy fear, judges and the Sentencing Commission should seize this unique post-*Booker* moment as an opportunity to begin incrementally developing a more fair and effective federal sentencing system. Judges and the Sentencing Commission should trust lawmakers to respond positively to thoughtful and reasoned explanations of how federal sentencing can and should be improved.

Though the U.S. Sentencing Commission has never quite lived up to reformers' ideal of an expert sentencing agency, *Booker* provides a new and critical opportunity for the Commission to deliver on its promise. The Commission has a critical role and unique responsibilities in the analysis and development of the federal sentencing system in the wake of *Booker*, in part because the Commission is the only institution that, by virtue of its information and perspective, can take a truly comprehensive and balanced view of the entire federal sentencing landscape. Consequently, not only should the Commission continue to assemble and make publicly available post-*Booker* sentencing data, but it should help frame and shape how both the courts and Congress understand and respond to post-*Booker* developments.

#### Notes

- <sup>1</sup> *United States v. Booker*, 125 S. Ct. 738 (2005).
- <sup>2</sup> I have explored the conceptual puzzle of *Booker* in a number of recent articles. See Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 CHI. LEGAL FORUM 1; Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653 (2005); Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. \_\_\_\_ (forthcoming 2006).
- <sup>3</sup> In the 1970s, Justice Breyer played a role in Congress's development of the Sentencing Reform Act as a lawyer for the Senate Judiciary Committee, and in the 1980s he played a central role in the U.S. Sentencing Commission's development of the federal sentencing Guidelines as a member of the original Commission. See Tony Mauro, *Breyer Sought Advice on Whether to Recuse in Sentencing Case*, LEGAL TIMES, Jan. 18, 2005 (discussing "Breyer's involvement in creating the federal guideline system, first as a lawyer for the Senate Judiciary Committee in the late 1970s and then as a member of the Sentencing Commission from 1985 to 1989"); see also Emily Bazelon, *Locked In*, BOSTON GLOBE magazine, Aug. 1, 2004 (discussing Justice Breyer's work as a member of the original U.S. Sentencing Commission).
- <sup>4</sup> *Booker*, 125 S. Ct. at 764.
- <sup>5</sup> *Id.* at 767.
- <sup>6</sup> *Id.* at 765-66.
- <sup>7</sup> *Id.* at 767.
- <sup>8</sup> See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005); *United States v. Tabor*, 365 F. Supp. 2d 1052 (D. Neb. 2005); *United States v. Valencia-Aguirre*, \_\_\_ F. Supp. 2d \_\_\_ (M.D. Fla. 2006).
- <sup>9</sup> See U.S. Sentencing Commission, *Special Post-Booker Coding Project*, at 1 (Jan. 5, 2006), available at [http://www.ussc.gov/Blakely/PostBooker\\_100506.pdf](http://www.ussc.gov/Blakely/PostBooker_100506.pdf)
- <sup>10</sup> See *Sentencing Commission Feels the Effect of Booker and Blakely*, THE THIRD BRANCH, Vol. 37, No. 12 (December 2005) (Q & A with Sentencing Commission Chair Judge Ricardo Hinojosa).
- <sup>11</sup> See USSC Post-*Booker* data, *supra* note 9, at 1.
- <sup>12</sup> See *id.* (detailing that roughly 62% of all cases are sentenced within the applicable Guideline range).
- <sup>13</sup> See *id.* at 7.
- <sup>14</sup> See *id.* at 15.
- <sup>15</sup> See, e.g., *United States v. Ranum*, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005); *United States v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005); *United States v. Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa 2005); *United States v. Ramirez-Ramirez*, 365 F. Supp. 2d 728, 731-32 (E.D. Va. 2005).
- <sup>16</sup> See Ryan S. King & Marc Mauer, *The Sentencing Project, Sentencing with Discretion: Crack Cocaine Sentencing After Booker* (Jan. 2005), reprinted in this Issue.
- <sup>17</sup> *Id.*
- <sup>18</sup> See Testimony of Assistant Attorney General Christopher Wray Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives (Feb. 10, 2005), reprinted in 17 FED. SENT'G REP. 303 (2005).
- <sup>19</sup> *Id.*
- <sup>20</sup> Sentencing Guidelines Speech by Attorney General Alberto Gonzales (June 21, 2005), reprinted in 17 FED. SENT'G REP. 324 (2005).
- <sup>21</sup> *Id.*
- <sup>22</sup> See USSC Post-*Booker* data, *supra* note 9, at 7.
- <sup>23</sup> For further development on these points, see generally Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN L. & POL'Y REV. 93 (1999) (discussing sentencing reformers' vision of the judiciary having particular institutional advantages for sentencing lawmaking which counseled judges' inclusion in the development of sentencing law and thus favored a guideline system incorporating mechanisms to promote a common law of sentencing); Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 77 NOTRE DAME L. REV. 21 (2000) (same).