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Same Old Sentencing

Federal guidelines, now advisory, still shape justice system.

BY DOUGLAS BERMAN

A dynamic year in the field of sentencing got off to a dramatic start. In January, the Supreme Court radically altered a federal guideline sentencing system that had been operational (and thought constitutionally sound) for more than 15 years.

One lesson of the remarkable ruling in *United States v. Booker* is that a badly splintered Supreme Court will sometimes embrace mysterious jurisprudential logic. Dual 5-4 majorities issued dueling opinions in *Booker*: The Court's first opinion held that the federal guidelines, when operating as mandatory rules that enhance sentences based on judicial fact finding, violated the Sixth Amendment's *jury* trial right. But the Court's second opinion crafted a remedy that rendered the guidelines advisory and thus gave federal *judges* new sentencing power.

As 2005 draws to a close, a broader and perhaps more important lesson has emerged from the aftermath of the *Booker* decision—namely that sentencing developments are often influenced more by sentencing culture than by sentencing doctrine.

The force of the sentencing culture is vividly revealed by the fact that, in the wake of *Booker,* federal sentencing practices and outcomes have not really changed much (at least not yet).

Year in Review 2005

Judicial complaints about the rigidity, complexity, and harshness of the federal sentencing guidelines were legion before *Booker.* One might have thus expected a radical transformation of federal sentencing after the Supreme Court recast the guidelines from stern mandates to simple advice. But a year later, as revealed by numerous district and circuit court opinions and cumulative post-*Booker* data, the conversion of the guidelines from mandatory to advisory has not significantly altered the central features of federal sentencing.

It appears that the legal and political culture has made the federal sentencing system almost impervious to dramatic change. The legal culture of federal sentencing during the pre-*Booker* years 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 long sentences for most federal offenders. The 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 still see the federal sentencing system exceedingly focused on guideline calculations based on judicial fact finding. Most sentences are still imposed within the (now advisory) guideline ranges. Long terms of imprisonment for most offenders remain the norm.

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 of the federal sentencing system, and the decision has perhaps aggravated the complexity and overall harshness of the system.

Of course, legal and political cultures can and do evolve. An evolution in judicial personnel and attitudes over the past two decades has resulted in more judges feeling more comfortable handing out long sentences and having their sentencing decisions micromanaged. This reality in part explains why the federal guidelines, though reviled by many upon their initial enactment, are now, after *Booker,* being embraced like a security blanket.

There are reasons to suspect that, over a longer time period than one year, the culture of guideline compliance may change.

Lawyers will become more adept at encouraging the exercise of the expanded discretion that *Booker* bestows, and sentencing judges may in turn become more skeptical of the guidelines' advice as they become more comfortable viewing the guidelines only as advice. Such evolutions in the culture surrounding federal sentencing may prove more critical to the future of the system than any doctrinal modifications coming from Congress or the Sentencing Commission.

The other major dramatic sentencing decision by the Supreme Court this past year—the ruling in *Roper v. Simmons* to reverse a recent prior holding and declare that the Eighth Amendment now categorically precludes defendants who commit capital crimes under the age of 18 from being executed—is another lesson in the interplay between sentencing law, policy, and culture.

The Supreme Court has decided that the Eighth Amendment should reflect the "evolving standards of decency that mark the progress of a maturing society," which necessarily requires the Court to act as a constitutional compass of the national death-penalty culture.

Having cast itself into such a role—and with new evidence of flaws in the administration of capital punishment, revealed most clearly in the evidence of innocent persons being sent to death row, raising new concerns about the death penalty—the Court (with a five-member majority) concluded in *Roper* that the constitutional compass is now pointing toward restricting the reach of the death penalty.

The enduring question is whether the Supreme Court's assessment of death-penalty culture might lead to still further constitutional restrictions on the administration of society's ultimate punishment.

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