Some Thoughts on Sentencing Post-*Booker*

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Legislative proposals[1] and other official responses[2] promoting a return to a sentencing system that substantially constricts judicial discretion have, not surprisingly, followed in the aftermath of *Booker*.[3] More such proposals and responses will, no doubt, be forthcoming, although congressional action in response to *Booker* appears unlikely until next year.

Those who believe that the Supreme Court's restoration of considerable, but by no means absolute, judicial discretion and control over sentences is sensible, sound, and wise—and worth preserving—should respond vigorously to demands to reinstate the pre-*Booker* regime, or institute an even more restrictive sentencing structure. They should begin doing so, moreover, earlier rather than later so that public discussion, once it begins in earnest, may more likely involve thorough consideration of the premises underlying, purposes for, and consequences of particular legislative proposals.

Any discussion of sentencing post-*Booker* should, moreover, look beyond simply the number of departures and deviations from Guideline sentences and the extent to which the rate of departures and deviations may (assuming such may become so) be increasing. Comprehensive evaluation of sentencing under *Booker* must take into account several considerations. The following seem to me to be among them.

First, the judicial hostility to the Sentencing Guidelines that marked their early years is largely a thing of the past. Most of today's District Judges, having been appointed since 1987,[4] have known only the Guideline system. Even those whose federal judicial experience predates the Guidelines have become accustomed since *Mistretta*[5] to the presence of the Guidelines and appear generally to accept the Guidelines' role in their daily judicial lives.

Second, while, in all likelihood, all District Judges welcome the discretion returned to them by *Booker*, that discretion is far from unfettered, as it was before passage of the Sentencing Reform Act. The Supreme Court's ruling that the Guidelines are advisory[6] makes clear that the Guidelines necessarily play a crucial role in the determination of individual sentences. *Booker* neither repeals nor repudiates the Guidelines; it restores, rather, substantial but not unlimited judicial discretion, while restraining that discretion within the Guideline framework.

Third, prosecutorial influence over sentencing outcomes, which the Guideline system in real-world practice had greatly enhanced,[7] remains substantial. *Booker* leaves unaffected the role in our criminal process of plea bargaining, including most particularly charge and sentence bargaining. Judges appear rarely to have rejected plea bargains, including sentence-based bargains, before or during the mandatory Guideline regime. There is little reason to expect that the rate of judicial rejections of sentence bargains will increase significantly post-*Booker*.

Under *Booker*, judges have, however, a greater opportunity to exercise oversight over bargain-based sentence agreements, especially those in which the proposed sentence appears too lenient. The presence of such oversight, even if rarely exercised through rejection of the bargained-for sentence, will influence negotiations and increase the likelihood that the sentencing outcome proposed or agreed to by the parties will be both reasonable and acceptable to the court.

Given the fact that since *Booker* about 95 percent of all convictions are the result of guilty pleas,[8] prosecutors post-*Booker* will continue to have considerable influence in the shaping of sentences. The counterweight to prosecutorial discretion imposed by *Booker* may well have its greatest impact in those cases, quite few in number, which go to trial.

That counterweight may, moreover, result in less disparity in the sentences of like offenders engaging in like criminal conduct than under the pre-*Booker* mandatory Guideline system. A system, such as that which came into being after the Sentencing Reform Act, in which prosecutorial discretion functioned without external check, oversight, or control could and, in the view of many,[9] did increase, rather than decrease, the frequency and degree of disparity in sentences.

By restoring balance in the exercise of discretion, lost when the Guidelines were mandatory, *Booker* furthers the basic goal of greater uniformity nationally in the sentences received by similar offenders who engaged in similar criminal conduct. While the prosecutor will continue to play a significant role, particularly through plea bargain-

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ing, *Booker* simply ensures that that role will not be beyond oversight, as it was when the Guidelines were mandatory.

Fourth, appellate review of sentences, the other major reform (in addition to the Guidelines) introduced by the Sentencing Reform Act, will continue to be of critical importance in controlling the discretion of District Judges and reducing disparity among District Judges in the Circuits. Although *Booker* in part[10] displaced *de novo* appellate review with review on the basis of reasonableness,[11] deviations from the norm continue to be subject to close appellate scrutiny.

In time, rulings by appellate courts will serve the function they have always served: namely, to develop on a case-by-case basis a coherent body of law which, as to many issues, is likely to be uniform across the Circuits. Where it is not, the Supreme Court will have the final say. This, in turn, will result in more channeled discretion at the district court level and overall lessened disparity in sentences.

Fifth, in light of the continuing role of the appellate courts, proponents of *Booker*'s abrogation should not be allowed to rely uncritically or unfairly on random examples of district court sentences to support claims of increasing disparity or the inability of federal judges to use their restored discretion reasonably and lawfully.[12] Like claims about the untrustworthiness of civil jurors following the McDonald's "hot coffee" case, such examples are not a valid basis for assessing how well the post-*Booker* regime is or is not functioning.

Most important, the more unreasonable a District Judge's sentence appears to be (and thus may be used to support proposals to abrogate *Booker*), the more likely in time is reversal on appeal.

Sixth, rather than responding hastily, Congress should wait for appellate review to address and, where appropriate, reject departures and deviations from the Guidelines. Our Constitution rests on a common-law foundation, which takes its strength from judicial decisions formed case-by-case over time. The most important of those decisions, carrying the most precedential weight, are those fashioned on review.

To some extent, the Sentencing Guidelines have their antecedent in the Code systems of continental jurisprudence. The Guidelines do not and could not displace our common-law tradition; their implementation within that system under *Booker* requires giving the appellate courts, including the Supreme Court, time in which to fashion the federal common law of sentencing.

No fair or accurate assessment of the post-*Booker* experience is possible until appellate courts have issued enough decisions to create a post-*Booker* sentencing jurisprudence. To act legislatively before gaining that jurisprudence has evolved through appellate review would be to disregard the fundamental character of the legal system envisioned in and established by our Constitution.

Seventh, the term *disparity* should not be used as if all disparity in sentences of like offenders for like offenses and conduct could be eliminated completely. While avoidance of disparity is an ideal, elimination of all unequal treatment of like offenders, offenses, and conduct can never be absolute. No two human decisions about the consequences of like circumstances can ever be entirely equivalent. This is especially so given the continuing influence of prosecutorial discretion on sentencing outcomes.

Any discussion of disparity must, in any event, ask not whether disparity in sentencing exists, but whether apparently disparate sentences are unwarranted. The extremes—the ones that would not fit within a bell curve—are the concern, not those reasonably close to the middle, as that middle has been defined by the applicable Guideline range.

Discussions of disparity should, moreover, keep in mind the difficulty of ascertaining empirically how close courts are coming to the goals of reducing differences in sentences in like cases. Any such determination should, in any event, be based only on those sentences that have become final through either waiver of appeal or appellate decision. As occurs in judging a diving competition, appellate courts can be expected to throw out aberrational high and low sentences, moving the final "score" from either extreme toward the middle.

Eighth, some increase post-*Booker* in the number of judicially initiated departures should be expected and acceptable. Giving judges more discretion while retaining and confirming the role of the Guidelines system was the principal purpose and consequence of that decision. With increased discretion will come some increased use of that discretion.

Ninth, when evaluating how properly District Judges are exercising their increased discretion, there is a crucial distinction between departures and deviations resulting from motion by or otherwise at the urging of the government and those that are solely judge-initiated.

So far since *Booker* the rate of judicially initiated departures has been quite low: about one in eight post-*Booker* departures has resulted from a unilateral judicial decision to go outside the Guideline range.[13]

There is, moreover, another related and equally critical factor that must be taken into account when evaluating how well or properly judges exercise their discretion when departing from the Guideline range: namely, the extent to which judicially initiated departures are outside the applicable range. There is a sizable difference between a 10 or 20 percent variance from a Guideline minimum or maximum and a variance of 50, 60, or 80 percent.

The degree, therefore, as well as the number of judicially initiated departures, matters. If most judicially initiated departures (which presently represent a relatively small portion of overall departures) stay within acceptable limits, arguments against the post-*Booker* system should be less persuasive.

Tenth, when assessing whether downward departures and deviations from the Guidelines have been unwarranted, attention should not be limited solely to the number and degree of departures and deviations. It is also important to a fair understanding of how well the post-*Booker* regime is working to consider the frequency of government appeals.[14] Account should likewise be taken of the rate of affirmance or reversal in such appeals.

To be sure, limited prosecutorial resources prevent appeals of all sentences that the government considers unsuitable. But that does not mean that the government will not vigorously appeal those sentences that it views as manifesting an unwarranted and unreasonable degree of departure or deviation from the Guidelines.

Thus, while the government's decision not to appeal a particular sentence will reflect a variety of considerations, one of those considerations will likely be its acceptance in the particular case of the court's outside-the-Guideline sentence and the rationale for that sentence. A decision not to appeal can, accordingly, often be viewed as an indication that the government accepts the sentence as reasonable and lawful.

Eleventh, consideration of whether to respond to or repudiate *Booker* legislatively should compare the merits of what we had pre-*Booker* and what we have after *Booker*.

When the Guidelines were mandatory, prosecutorial discretion and control over sentencing outcomes were unregulated, unreviewable, and barely restricted. Those circumstances were nascent in the Guidelines when promulgated, confirmed and energized by *Mistretta*, intensified by the increase in mandatory minimum sentences, and entrenched through hundreds of thousands of plea bargains between 1987 and January 22, 2005.

For now, in contrast, *Booker* has restored judicial discretion. Most importantly, that discretion is regulated, reviewable, and restricted.

Since *Booker*, we have balance and control. Before, we had neither.

Twelfth, one of the most fundamental benefits of the Sentencing Reform Act and the Guidelines remains fully in place: namely, that the Guidelines compelled judges to be more honest and open about their sentencing decisions. The need to formulate our reasons for our results makes us think about those results more deeply and thoroughly than was necessary before November 1, 1987. The need to express those results for the defendant and public to hear and appellate courts to review makes us more careful and, in the end, more just.

Finally, a personal observation. For more than twenty-five years (fifteen as a Magistrate Judge and eleven as a District Judge), I have observed the workings and work of the federal judiciary. In neither, and in nothing else that judges have said or done, have I ever seen or heard a judge being or desiring to be "soft on crime," expressing indifference to the pain and injuries suffered by the victims of crime, or wishing to expose others to the risks of recidivism.

If one of my sentences, or that of another judge, appears to manifest such desire, indifference, or wish, we should be criticized and that decision should be reversed on appeal. But that is no reason to assert that the judiciary is not worthy of the trust of the public or unable day in and day out, case-by-case, and defendant-by-defendant to exercise reasonably and responsibly the discretion restored to it by *Booker*.

Notes

1 *See* Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005, H.R. 1528 (Introduced April 6, 2005, by Rep. James Sensenbrenner, Chair, House Judiciary Committee).

2 *See* Prepared Remarks of Attorney General Alberto Gonzales (Sentencing Guidelines Speech), Washington, D.C., June 21, 2005 (available at http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm) reprinted *infra* 17 FED. SENT REP. 324 (hereinafter Gonzales Speech). Calling for "construction of a minimum guideline system," the Attorney General referenced four post-*Booker* sentences that he contended reflected unwarranted leniency. For a critique of the speech's accuracy as to some of the facts asserted about those sentences and its conclusions about those sentences, see Nat'l Assn. of Criminal Defense Lawyers, *Truth in Sentencing? The Gonzales Cases* (available at http://www.nacdl.org/public.nsf/mediasources/gonzales_cases) (hereinafter NACDL Gonzales Cases).

3 *United States v. Booker*, 125 S. Ct. 738 (2005).

4 There are 679 authorized District Judgeships; ___ currently serving active District Judges have taken office since November 1, 1987, the Guidelines' effective date. As of the end of FY 2004, 291 Senior District Judges were continuing to serve; of those Judges, ___ were confirmed after November 1, 1987. See http://www.fjc.gov/history/home.nsf.

5 *Mistretta v. United States*, 488 U.S. 361 (1989) (rejecting constitutional challenges to the Sentencing Guidelines).

6 *Booker*, 125 S. Ct. at 757.

7 *See, e.g., United States v. Green*, 346 F. Supp. 2d 259, 269 (D. Mass. 2004) (Young, C.J.) (noting that "the phenomenon known as 'fact bargaining' has come to flourish as never before in federal courts" so that the Department of Justice "has the power—and the incentive—to ratchet punishment up or down solely at its discretion"); *see also, e.g.,* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation,* 105 COLUM. L. REV. 1010, 1011–12 (2005) ("Prosecutors have become more powerful through the potent combination of far-reaching and duplicative criminal codes, relatively few resources available for trial, and nondiscretionary sentencing laws."); Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 788–89 (2002) (noting that the Guidelines "increased the significance of prosecutorial discretion over charging and prosecutorial dominance over plea bargaining" and asserting that "the plasticity of criminal statutes, particularly in a federal system lacking a coherent criminal code, invites prosecutorial manipulation of sentences by selective charging and plea decisions"); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers,* 56 STAN. L. REV. 1211, 1252 (2004) ("The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing."). *But see* James B. Burns et al., *We Make the Better Target (But the Guidelines Shifted Power*

From the Judiciary to Congress, Not From the Judiciary to the Prosecution), 91 NW. U.L. REV. 1317, 1320 (1997) (asserting that the Guidelines system "has not in practice been[] a vehicle to enlarge the power of the prosecutor"). To be sure, as the authors assert, Congress, through the Sentencing Reform Act, reduced judicial discretion en gros. But, in doing so, Congress, by removing the preexisting barrier to unregulated and unconstrained prosecutorial discretion, created a vacuum into which, prior to *Booker*, prosecutors alone could step. Prosecutorial power and influence over sentences consequently and necessarily increased.

[8] U.S. Sentencing Commission, *Special Post-*Booker *Coding Project,* at 37 (July 14, 2005) (hereinafter cited as July 14, 2005 USSC Report). For the three-year period ending with Fiscal Year 2004, pleas of guilty were entered by 86.5 percent of defendants. Administrative Office of the U.S. Courts, Annual Reports, 2002-04, Tables D-10.

[9] *See, e.g.,* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1515 (1993) (predicting that "[b]y giving prosecutors substantial control over sentencing, . . . the guidelines simply shift the locus of disparity from judges and parole commissions to prosecutors' offices. By their largely unreviewed charging decisions, prosecutors have the power to treat like cases differently, frustrating Congress' goals."); Linda Drazga Maxfield et al., U.S. Sentencing Commission, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* at 21 (January 1998) (noting disparities resulting from lack of uniformity in making § 5K1.1 motions: "the evidence consistently indicated that factors that were associated with either the making of a § 5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity."); *see also* Justice Breyer's prediction in *Booker* of the effect of a mandatory Guideline system under a regime of jury-determined sentencing factors: "plea bargaining would make matters worse," he asserted, because of the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime. Compared to pre-Guidelines plea bargaining, plea bargaining of this kind would necessarily move federal sentencing in the direction of diminished, not increased, uniformity in sentencing. It would tend to defeat, not to further, Congress' basic statutory goal. *Booker*, 125 S. Ct. at 762–63.

Most District Judges would probably view this as an accurate description of what *did* happen under the mandatory Guideline system.

[10] *See United States v. Hazelwood*, 398 F.3d 792, 795 (6th Cir. 2005) (after *Booker* "we review the factual determinations for clear error and legal determinations de novo"); *U.S. v. Villegas*, 404 F.3d 355, 359 (5th Cir. 2005) ("when a district court has imposed a sentence under the Guidelines, this court continues after *Booker* to review the district court's interpretation and application of the Guidelines de novo").

[11] *Booker*, 125 S. Ct. at 766.

[12] See the critique in NACDL Gonzales Cases, *supra* note 2, of the four cases referenced by the Attorney General on June 21, 2005, in Gonzales Speech, *supra* note 2. As of June 6, 2005, District Judges had imposed 20,369 post-*Booker* sentences. July 14, 2005 USSC Report, *supra* note 8, at 1.

[13] The Sentencing Commission reports that, as of June 6, 2005, 13 percent of post-*Booker* downward departures have been judicially initiated. *See* July 14, 2005 USSC Report, *supra* note 8, at 2.

[14] It is interesting to note that, of the four sentences criticized by the Attorney General in his June 21, 2005, speech (Gonzales Speech, *supra* note 2), the government elected not to appeal two of those sentences. NACDL Gonzales Cases, *supra* note 2, at 5, 7.