Booker Is the Fix

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The House Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security recently held a hearing on "The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after *U.S. v. Booker*." Judge Saris, testifying on behalf of the Sentencing Commission, proposed a list of legislative changes designed to require that the guidelines be given more weight, and that non-guideline sentences be reviewed more strictly, to address its concern that there had been an increase in the number of variances.[1] Although the Commission acknowledged that the guidelines continue to exert a "gravitational pull" and that judges follow the guidelines in most cases, it said these proposals were needed to make the guidelines more "strong and effective."[2] Contrary to what the Commission and other critics of the *Booker* decision and those wary of judicial discretion claim, *Booker* did not create a problem that needs fixing. *Booker* was the fix, not the problem.

I. Suggestions for legislative reform

The Commission seeks legislation that would require sentencing judges to give the guidelines "substantial weight," to consider the Commission's restrictions on reasons for sentences outside the guideline range in every case, and to do so before considering the factors and purposes set forth in § 3553(a), and to give greater justifications for non-guideline sentences the further they vary from the guideline range.[3] The Commission also proposes that appellate courts be required to presume all guideline sentences to be reasonable, but to review non-guideline sentences strictly.[4] Finally, the Commission asks Congress to resolve an alleged "tension" between § 3553(a)(1) and the Commission's interpretation of 28 U.S.C. § 994(e).[5] Many, including some of my colleagues, are of the opinion that the Commission's proposals would be unconstitutional.

Other critics of the *Booker* decision have also proposed "fixes." Judge William K. Sessions III, a former Chair of the Commission, Professor Frank O. Bowman III, and Adjunct Professor William G. Otis propose that Congress enact a system of mandatory guidelines with aggravating facts to be charged in an indictment and proved to a jury or, as would more often be the case, decided by prosecutors and defense lawyers through plea bargaining.[6] Mr. Otis has also proposed that Congress abolish the Commission entirely. James E. Felman, who first proposed a jury-driven system similar to what Judge Sessions and Professor Bowman now urge, strongly advises against it now, in light of the evidence regarding how the system is actually functioning. Among the problems Mr. Felman identifies with such a system is that the wider ranges that would be required under a jury-driven system would invite greater variation in sentencing than exists today.[7] Judge Sessions and Professor Bowman suggest that Congress might cut back on mandatory minimums or might not issue so many directives to the Commission if their proposed system was enacted. That, I believe, is politically unrealistic.

What all of these proposals for fixes have in common is a desire to constrain the discretion of sentencing judges. This attack on judicial discretion suggests that Congress or the Commission—which know nothing about the facts and circumstances of particular offenses or the circumstances surrounding them—or prosecutors—who play an adversarial role in administering criminal justice—are in a better position to determine fair and just sentences than the judges who hear all of the facts and circumstances from all sides. This defies common sense. The guidelines themselves developed in a "one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who appl[ied] the rules."[8] Sentences were driven almost solely by aggravating circumstances, whereas mitigating circumstances were prohibited or strongly disfavored. Dissimilar defendants were treated the same, and unwarranted disparities abounded. *Booker* fixed these problems by putting the judge, as opposed to remote and adversarial players, in the position of determining the appropriate sentence in the particular case.

II. The post-*Booker* sentencing system is working smoothly and moving toward long-term improvement.

When *Booker* was decided, there were dire predictions from some quarters that erratic sentencing would result from allowing judges to exercise discretion guided by the

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factors and purposes set forth in 18 U.S.C. § 3553(a), subject to appellate review. Seven years later, those predictions have still not materialized. In fact, the advisory guidelines system is functioning much like the pre-*Booker* system, with some notable and much-needed improvements. The Sentencing Commission's data reveals that the great disparities in sentencing that were feared do not exist. And the myth that defendants are getting off with light sentences because judges are not following the guidelines is quickly debunked when one considers that judges nearly always follow the guidelines' recommendations.[9]

Judges are following the guidelines or the prosecutor's recommendation to impose a lower sentence over 80 percent of the time.[10] The rate of non-government-sponsored below-guideline sentences has actually trended downward in recent reporting periods. That rate dropped from 18.7 percent in the fourth quarter of fiscal year 2010 to 17.5 percent in both the last quarter of fiscal year 2011 and the first quarter of fiscal year 2012.[11] This reduction in the percentage of below-guideline sentences can be attributed at least in part to the reduction in the crack guidelines on November 1, 2010, as directed by the Fair Sentencing Act of 2010. Due to the lowering of guideline ranges for crack offenses, the number of instances in which a judge reasonably concluded that a below-range sentence was necessary to serve the purposes of sentencing was also reduced. But even an 18.7 percent judicial variance rate would hardly be cause for alarm; in that event, judges would be sentencing within the guideline range, above the guideline range, or following prosecutors' requests for sentences below the guideline range 81.3 percent of the time. Moreover, the government itself moves for below-range sentences in 26.9 percent of cases,[12] and does not object to judicial departures and variances in at least half the cases in which they are imposed.[13] Moreover, even when judges do not follow the guidelines, they do not vary far from the guideline range. The median extent of downward variances and departures is less than 13 months, and has remained stable since *Booker* was decided.[14] The difference between the average guideline range and the average sentence imposed in all cases is a mere ten months; this too has remained stable since *Booker* was decided.[15] In fact, despite the modest increase in the rate of below-guideline sentences since *Booker*, "the size of their impact on sentence length has decreased."[16] Furthermore, judges are following the guidelines' recommendations for the kind of sentence to impose, whether prison, probation, or a split sentence including home detention or community confinement, more often than they were before *Booker*.[17]

So what does the data tell us? It tells us two things: First, it tells us that judges are still following the guidelines most of the time,[18] even though the guidelines do not include many mitigating factors that judges find to be relevant, and even though many disagree with certain guidelines.[19] Judges have, therefore, shown a great deal of restraint in imposing sentences outside the recommended range.

Second, it tells us that the system is functioning as it should. As demonstrated above in the example of the reduction in the crack guidelines and the corresponding reduction in below-range sentences, when the Sentencing Commission amends the guidelines to better reflect the statutory purposes and factors enumerated by Congress in 18 U.S.C. § 3553(a), judges follow the guidelines more frequently. This is an important point that deserves to be highlighted. When judges frequently vary from particular guidelines, they are sending the Commission an important message that those guidelines recommend punishment that is "greater than necessary" to achieve the purposes of sentencing. Judicial departures were intended to be an integral part of the guidelines system established by Congress in the Sentencing Reform Act of 1984 (SRA).[20] As the Supreme Court said in *Rita v. United States*, sentences outside the guideline range based upon the considerations laid out in 18 U.S.C. S 3553(a) "should help the Guidelines constructively evolve over time" as Congress intended.[21] And as the Court said in *Kimbrough v. United States*, the Commission can "'avoid excessive sentencing disparities'" through "ongoing revision of the Guidelines in response to sentencing practices."[22] The Commission should therefore fix the particular guidelines that are causing judges to vary rather than seek legislation to constrain judicial discretion.

III. The Guidelines System is not in need of a legislative "fix."

Since judges are imposing guideline sentences most of the time, and there is no evidence of undue leniency, we must question the wisdom of embarking on an enormous overhaul of federal sentencing, as some are suggesting. The Supreme Court's jurisprudence since *Booker* has highlighted the fact that some guidelines warrant less sentencing weight than others. Among those warranting less weight are those based on mandatory minimums or directives from Congress to increase punishment with no empirical research or data that such increases will further the goals of sentencing as required by the SRA. As discussed above, what proponents of mandated or presumptive guideline sentences do not seem to value is that sentencing judges are providing feedback to the Commission when they frequently vary from a particular guideline. Returning to a mandatory or near-mandatory guidelines scheme would again stifle this feedback and prevent judges from imposing sentences that in their reasoned judgment advance the purposes of sentencing based on the actual facts and circumstances of the cases before them. It is important to remember that when this occurs, it helps the Commission refine the guidelines.

Much of the discussion surrounding the need for a "fix" centers on alleged disparities in sentencing. Some of my colleagues, for example, have expressed grave concern about a study conducted by the Sentencing Commission that they read as showing growing racial disparities *as a result* of increased judicial discretion after *Booker*.[23]

It would be of great concern to me if this inference were credible. I do not believe it is for several reasons. The Commission itself has acknowledged that a conclusion that judges discriminate against racial minorities cannot be drawn from its study because the study does not include many legally relevant factors that legitimately affect judges' sentencing decisions.[24] Others have identified numerous problems with the Comission's study.[25] Researchers at Pennsylvania State University, using the same datasets but different methodologies, reached results in conflict with the Commission's.[26] Other recent studies from the University of Virginia and the University of Michigan indicate that if racial disparity in sentences exists after *Booker*, it is not the result of judicial discretion but of mandatory minimums that prevent judges from exercising discretion, and prosecutors' use of mandatory minimums.[27] This research is consistent with the Commission's recent report on mandatory minimums, finding that African American defendants are disproportionately subject to mandatory minimums.[28] Other evidence shows that, rather than creating racial disparity after *Booker*, judges have substantially reduced it by varying from guidelines the Commission has found to have a disproportionate impact on African Americans without accomplishing any purpose of sentencing.[29] We should also take seriously the fact that lawyers who represent defendants of all races in federal court report that they do not give credence to the notion that judges discriminate against racial minorities. They say that defendants of all races are treated *more* fairly after *Booker*.[30]

Some of my colleagues and others have also expressed great concern over different rates of non-government-sponsored below-guideline sentences in different districts, as reported by the Sentencing Commission.[31] But, contrary to what my colleagues and others appear to believe, the Congress that enacted the SRA recognized that there would not be lockstep uniformity among districts across the country.[32] Moreover, there exist several reasons—wholly independent of judges—for variations among districts in rates of non-government-sponsored below-range sentences. These reasons include: variations in composition of the case load; variations in the presence of cases, such as immigration cases, that have low guideline ranges where defendants may be sentenced to time served; and variations in the rate of government-sponsored downward departures, including the use of "fast track" departures, substantial assistance departures, other variances and departures, and Rule 35 motions after sentence is imposed. In addition, prosecutorial charging decisions, including overcharging or stacking of charges to ratchet up guidelines sentences, can greatly affect the rate of departures in a given district.

Despite this reality, there is virtually no discussion in Congress about these factors, and there is certainly no legislation aimed at limiting prosecutorial discretion. Even efforts to scale back mandatory minimum sentences, which have time and again been demonstrated to result in racial disparities and irrational sentences, are met with fierce opposition.

One important consideration that we should always keep in mind in our discussions about sentencing: there is a great difference between disparities in sentencing and *unwarranted* disparities in sentencing. The SRA was concerned with unwarranted sentencing disparities. Focusing only on rates of below-guideline sentences obscures this truth and elevates a desire for blind uniformity above fairness. If any revision of the existing guidelines is to be done, it should be to address *unwarranted* sentencing disparities, just as we did with the Fair Sentencing Act. The Commission should review and revise particular guidelines that recommend punishment that is greater than necessary to serve the purposes of sentencing (that is, guidelines that are too severe) and guidelines that promote unwarranted disparities. The guidelines system itself does not need legislative reform. When Congress asks whether *Booker* needs to be fixed, the Commission should respond by reporting the evidence that shows that the current sentencing system is working well.

IV. Conclusion

Recent calls for legislative reform presume something that has never been demonstrated—that there is a problem that needs fixing. If the guidelines system is not broken, we shouldn't fix it, especially not legislatively. We regularly revisit the question of whether *Booker* needs to be fixed. The continuing myopic focus on the alleged problems created by the *Booker* decision causes us to focus on the wrong questions, when the true problems with federal sentencing are mandatory minimum sentences and a lack of evidence-based sentencing practices. That is the conversation we should be having, and that conversation is long-overdue.

Notes

1 Judge Patti B. Saris, Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee, October 12, 2011, 24 Fed. Sent'g Rep. 344, 344–45 (2012).

2 *Id*. at 344.

3 *See id.* at 344–45; *see also* USSG § 1B1.1(b)–(c) (setting forth the Commission's "three-step" process).

4 Saris, *supra* note 1.

5 *Id*.

6 *See* William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & Pol'y 305 (2011); William G. Otis, Adjunct Professor of Law, Georgetown Law Center, Statement before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary for the Hearing on "Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After *Booker*" (Oct. 12, 2011); Frank O. Bowman III, Statement before the U.S. Sentencing Commission (Feb. 16, 2012).

7 Testimony of James E. Felman, Member, American Bar Association, before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary for the Hearing on "Uncertain Justice: The Status of Federal

Sentencing and the U.S. Sentencing Commission Six Years After *Booker*" 22–23 (Oct. 12, 2011).

[8] Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319–20 (2005).

[9] *See* U.S. Sentencing Commission, Preliminary Quarterly Data Report, First Quarter Release, 30, tbl. 1 (FY 2012) (reporting that 80.5% of all sentences are either within the guidelines or based on a government-sponsored departure or variance; another 2% are above the guideline range), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_1st_Quarter_Report.pdf; Testimony of James E. Felman, *supra* note 7 (reporting that the median downward variance or departure is less than 13 months).

[10] *See* U.S. Sentencing Commission, *supra* note 9.

[11] *Id*. at tbl. 4.

[12] *Id*. at tbl. 1.

[13] *Id*. at tbl. 6.

[14] Felman, *supra* note 7.

[15] *See* U.S. Sentencing Commission, *supra* note 9, at 32 fig.C.

[16] Jeffrey Ulmer & Michael T. Light, *Beyond Disparity: Changes in Federal Sentencing After* Booker *and* Gall*?*, 23 Fed. Sent'g Rep. 333, 340 (June 2011).

[17] *Compare* U.S. Sentencing Commission, 2003 Sourcebook of Federal Sentencing Statistics, tbl. 12, *with* U.S. Sentencing Commission, *supra* note 9, at 30, tbl. 18.

[18] U.S. Sentencing Commission, *supra* note 9, tbl. 1.

[19] U.S. Sentencing Commission, Results of Survey of United States District Judges January 2010 through March 2010, tbls. 5, 8, 10, 13.

[20] See 28 U.S.C. §§ 991(b)(2), 994(o), 995(a)(13)–(16); S. Rep. No. 98-225, at 80 (1983) ("The statement of reasons . . . assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements."); id. at 151 ("Appellate review of sentences is essential . . . to provide case law development of the appropriate reasons for sentencing outside the guidelines," which "will assist the Sentencing Commission in refining the sentencing guidelines."); id. at 182 ("[R]esearch and data collection . . . functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.").

[21] Rita v. United States, 551 U.S. 338, 358 (2007).

[22] Kimbrough v. United States, 552 U.S. 85, 107 (2007) (quoting United States v. Booker, 543 U.S. 220, 264 (2005).

[23] U.S. Sentencing Commission, Demographic Differences in Federal Sentencing Practices: An Update of the *Booker Report*'s Multivariate Regression Analysis (2010); Testimony of Judge Patti B. *Saris* before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives. Available at http://judiciary.house.gov/hearings/pdf/Saris%2010122011.pdf, at 53–55.

[24] U.S. Sentencing Commission, *supra* note 23, at 4, 9–10.

[25] *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. Pa. L. Rev. (forthcoming 2012), *available at* http://ssrn.com/abstract=1987041; Jeffery T. Ulmer et al., *Racial Disparity in the Wake of the* Booker/Fanfan *Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 Criminology & Pub. Pol'y 1077 (2011).

[26] Baron-Evans & Stith, *supra* note 25; Ulmer et al., *supra* note 25.

[27] *See* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities, Judicial Discretion, and the United States Sentencing Guidelines* 3, Univeristy of Virginia School of Law, Public Law & Legal Theory Research Paper Series No. 2012-02 (February 2012), *available at* http://ssrn.com/abstract=1636419; M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, University of Michigan Law & Economics Working Paper (2012), *available at* http://ssrn.com/abstract=1985377.

[28] U.S. Sentencing Commission, Mandatory Minimum Penalties in the Criminal Justice System 154, 159–60, 257–58, 352–54, 359–60 (2011).

[29] Baron-Evans & Stith, *supra* note 25 (reporting that "[b]y imposing below-guideline sentences that they could not have imposed under the mandatory guidelines, in fiscal year 2010 alone judges spared over 860 black defendants sentenced under the crack or career offender guidelines over 3300 years of unnecessary incarceration.").

[30] *See* Letter from Thomas W. Hillier, II, Fed. Pub. Defender, to the Hon. F. James Sensenbrenner, Chair, Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, and the Hon. Robert C. (Bobby) Scott, Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary 1–2 (Oct. 11, 2011); Raymond Moore, Testimony on Behalf of Federal Public and Community Defenders before the U.S. Sentencing Commission, February 16, 2012, 24 Fed. Sent'g Rep. 376 (2012); James E. Felman, Testimony on Behalf of the American Bar Association before the U.S. Sentencing Commission, February 16, 2012, 24 Fed. Sent'g Rep. 369 (2012).

[31] *See* Saris, *supra* note 23, at App. D.

[32] *See* 28 U.S.C. § 994(c)(4)–(5), (7) (2006) (identifying "the community view of the gravity of the offense," "the public concern generated by the offense," and "the current incidence of the offense in the community" as relevant sentencing considerations).