

STRUCTURE

THE ENFORCEABILITY OF SENTENCING GUIDELINES

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INTRODUCTION

The pre-*Booker* Federal Sentencing Guidelines were, by far, the most vigorously enforced sentencing guidelines in the nation.¹ That is to say, under pre-*Booker* federal law, judicial sentencing discretion was hemmed in—by a combination of statutory and administrative rules—to a much greater extent than under the laws of any state.² As compared with eighteen state guidelines systems in operation in early 2005,³ the federal system was a stark outlier in its

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1. This Article assumes that readers are familiar with the Court's highly publicized rulings in *United States v. Booker*, 125 S. Ct. 738 (2005), including the fact that the holdings were divided into a 5-4 “merits” opinion authored by Justice Stevens, *id.* at 747, and a 5-4 “remedial” opinion by Justice Breyer, *id.* at 764. Only Justice Ginsburg joined both the merits and remedial holdings. *Booker* and its predecessors are explored in more detail elsewhere in this Issue. See Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005) (in this Issue).

2. See AM. LAW INST., MODEL PENAL CODE: SENTENCING REPORT 116 (2003) [hereinafter ALI, MODEL PENAL CODE REPORT] (“[A]ll state guidelines systems locate much greater sentencing discretion with the judiciary [than the Federal Guidelines].”).

3. For the most up-to-date count of current state guidelines jurisdictions, see Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*,

emphasis on rule over discretion.

Booker has reduced the mandatory character of the Federal Guidelines, but the degree of change should not be overstated. The Court has not made the Federal Guidelines toothless, nor has it reinstated the kind of sentencing discretion held by district court judges in the days of indeterminate sentencing.⁴ It is true that, for purposes of constitutional discourse, the post-*Booker* (or *Booker*-ized) Guidelines are now dubbed “advisory” by the Supreme Court.⁵ This is little more than legal jargon, however—and part of the distorted terminology that has cropped up in the Court’s new Sixth Amendment jurisprudence.⁶ The word “advisory,” when attached to sentencing prescriptions, holds talismanic power for some Justices and therefore must be used strategically by other members of the Court. Policymakers should not credit the use of language stretched out of shape by the internal debates of the Justices. There is reason to think that the post-*Booker* Federal Sentencing Guidelines still pack as much wallop as any sentencing guidelines in the country.

I. THE RULE-DISCRETION CONTINUUM

Analysts of American sentencing guidelines, when drawing comparisons among a variety of jurisdictions, have used labels such as “advisory,” “voluntary,” “presumptive,” and “mandatory” to portray different regimes.⁷

105 COLUM. L. REV. 1190 (2005).

4. In indeterminate sentencing systems, trial courts had effectively unreviewable discretion to impose sentences anywhere within broad statutory ranges. For prison cases, however, actual sentence lengths were determined by parole boards and corrections officials. See generally ALI, MODEL PENAL CODE REPORT, *supra* note 2, at 18-27. For an extended description and definitive critique of indeterminate systems as they existed nationwide in the 1970s, see MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

5. *Booker*, 125 S. Ct. at 757 (Breyer, J.).

6. Just as striking as the Court’s new understanding of “advisory” Guidelines has been the Court’s unexpected redefinition of the concept of a “statutory maximum” punishment in the recent Sixth Amendment cases. In *Blakely v. Washington*, 124 S. Ct. 2531 (2004), the Court formulated the following novel definition:

[T]he “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . . In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Id. at 2537 (emphasis added; internal citations omitted); see also Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1093 (2005) (“[T]he *Blakely* Court’s new conception of a ‘statutory maximum’ penalty is not tied to colloquial meaning, legislative intent, or traditional usage of the term . . .”).

7. See, e.g., Frase, *supra* note 3; Reitz, *supra* note 6; Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington: Practical Implications for State Sentencing Systems*, POL’Y & PRAC. REV. (Vera Inst. of Justice: State & Sentencing Corrections), Aug. 2004, at 2, http://www.vera.org/publication_pdf/242_456.pdf (last visited Aug. 23, 2005).

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(The adjectives “advisory” and “voluntary” are used interchangeably in the literature.) These terms—which I have often used myself—have never been wholly adequate to capture the continuum of possibilities for the design of sentencing systems.

For one thing, no jurisdiction in recent history has used a matrix of sentencing rules that were *entirely* mandatory for every case. Even in pre-*Booker* federal law, there was some “give” in the system under trial courts’ (admittedly limited) departure power away from the Guidelines⁸ and under the safety-valve provision that applies to many cases otherwise controlled by statutory mandatory minimum penalties.⁹

Similarly, at least in the contemporary era, there has been no *purely* advisory approach to sentencing prescriptions in American law, under which judges were given a free hand to pronounce whatever sentences they liked without fear of reversal on any enforceable ground. No contemporary judge, for example, holds the power to vary punishment expressly for reasons of racial or religious animus,¹⁰ and the Constitution forbids punishment based on patently false information (if such misdirection is plainly apparent from the record).¹¹

In addition, there are an infinite number of stops between a purely advisory approach and a completely mandatory framework.¹² The idea that some guidelines have “presumptive” or provisional legal force tells us little about how many teeth the guidelines have, how sharp the teeth are, and what issues they engage. There are many shades and degrees of “presumptiveness.” Indeed, it is not always clear where the line should be drawn between a given “advisory” guidelines system, where trial court discretion is encumbered by modest constraints, and a so-called “presumptive” system, where judges may still hold wide swaths of decisional authority.¹³

8. See, e.g., Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21 (2000).

9. 18 U.S.C. § 3553(f) (2005); see Jane L. McClellan & Jon M. Sands, *The Hedgehog, the Fox, and the Guidelines: Blakely’s Possible Implications for the “Safety Valve,”* 17 FED. SENT’G REP. 40 (2005) (reporting that the federal safety-valve provision has been used in nearly forty percent of drug sentencings).

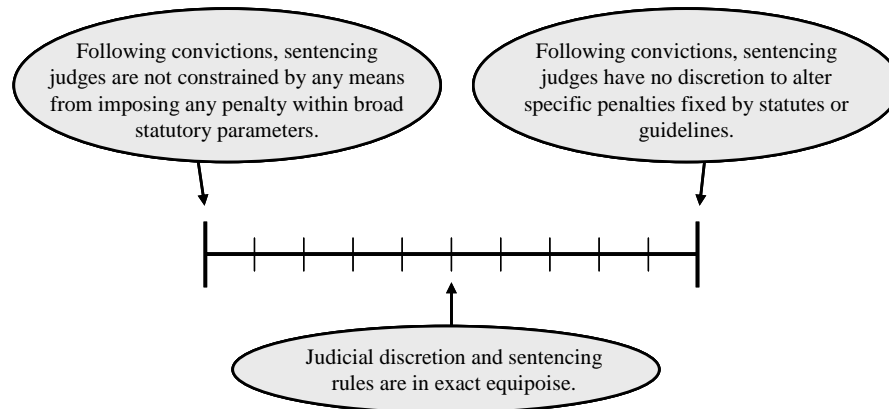
10. See FRANKEL, *supra* note 4, at 76.

11. See *United States v. Tucker*, 404 U.S. 443, 446-49 (1972) (requiring resentencing where sentence was based mistakenly on invalid prior convictions).

12. For a thoughtful argument that advisory Guidelines can be just as influential as their “presumptive” counterparts given the right conditions, see Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENT’G REP. 233 (2005).

13. The Pennsylvania guidelines system is a good example of a borderline regime that has been described in some forums as “advisory” (or “voluntary”) and in others as “presumptive.” The Pennsylvania Supreme Court characterizes the state’s guidelines as advisory. See *Commonwealth v. Sessoms*, 532 A.2d 775, 780-81 (Pa. 1987) (“Most important, the court has no ‘duty’ to impose a sentence considered appropriate by the Commission. . . . We may say that in directing courts to consider these guidelines, . . . the legislature has done no more than direct that the courts take notice of the Commission’s

Figure 1. Sentencing Rules Versus Judicial Discretion



When important questions of system design are on the drawing table, therefore, legislators and other policymakers are well served to discount crude labels in favor of a more fine-grained analysis. Exactly how advisory, presumptive, or mandatory is a given framework? One must study the intricacies of each proposed or existing system to find an answer—and the assessment may vary from one type of case to another.¹⁴

Figure 1 lays out a ten-point scale to aid visualization of what is at stake. At the left end of the continuum—or position zero—we can imagine a system in which judges hold hegemonic ability to fix penalties within expansive statutory ranges for felony offenses. There are no rules or prohibitions that judges must respect when doing so, except that the distant statutory maximum may not be exceeded. At position zero, in other words, trial judge sentencing discretion exists in a pure form within broad statutory bounds, and rulemakers—such as the legislature, sentencing commission, and appellate courts—exercise no authority at all within those boundaries. Rulemakers may advise and exhort as they like, but nothing they do carries legal force.¹⁵

At position ten, the opposite extreme of the continuum, we may imagine a

work.”). Commentators have nonetheless split on whether the Pennsylvania guidelines are best classified as voluntary or presumptive. See Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377 (2005); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of State and Federal Experiences*, 91 NW. U. L. REV. 1441, 1471-81 (1997).

14. For example, even in a state with advisory guidelines, some cases are governed by statutory mandatory minimum penalties. In such jurisdictions, trial courts hold considerably greater discretion in guidelines cases than in cases subject to a mandatory provision.

15. A famous example of a state supreme court admonition to the trial courts, unsupported by any institutional authority, is Justice Rabinowitz’s denouncement of the unduly lenient sentence for kidnapping and rape in *State v. Chaney*, 477 P.2d 441 (Alaska 1970).

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system in which the facts of conviction (and perhaps other facts, such as the defendant's criminal history) determine a fixed and specific punishment in every case, with no judicial leeway permitted under any scenario. This represents the total hegemony of rulemakers. For purposes of analysis, it does not matter whether the rules come from statutory command, definitive guidelines, or some other source. At position ten, someone with systemwide competence has mandated the exact sentencing outcome of every case in advance of its litigation, and judges are mere functionaries in the punishment process.

No twenty-first-century sentencing system is ever likely to plumb the full depths of positions zero or ten on the rule-discretion continuum. The important policy question is to locate the most salutary resting point between the extremes. It is equally important to understand that there are many different mechanisms for the calibration of judicial discretion along the continuum.

Figure 1 indicates an equilibrium point (position five) at which the relative authorities of sentencing judges and rulemakers are in equipoise. The figure does not implicitly recommend that lawmakers should strive to produce such a "balanced" system.¹⁶ Indeed, it would be difficult to lay out criteria for the achievement of perfect equilibrium. The reality of government is that, issue by issue, there always tends to be one official actor with more dispositive power than others. The particular usefulness of the continuum, as a mental map, is that it allows us to think about the legislature or commission becoming increasingly dominant over sentencing judges as the system moves to the right from position five, while the judiciary is ever more powerful as the system moves to the left.

What can a legislature do, in crafting a sentencing system, to place it deliberately in one spot or another on the rule-discretion continuum? There are many tools at lawmakers' disposal. Most obviously, perhaps, the legislature can enact finely tailored sentencing prescriptions for individual cases, or it can charter a sentencing commission to perform the same function. Then, the legislature can adopt a verbal formula for granting or withholding judicial authority to deviate from those prescriptions. In the context of sentencing guidelines, this is often called the "departure power." If the legal standard for guidelines departures is forgiving (e.g., a departure may be based on "any reason set forth on the record by the sentencing court"), then the guidelines system would fall toward the left-hand side of the rule-discretion continuum. If the departure standard is more rigid (e.g., a departure requires "a substantial and compelling reason subject to appellate court review"), the rulemakers have gained power, and judicial discretion is proportionally limited. This second type of guidelines system would move toward the right-hand side of the scale.

16. Discretion theorists since Kenneth Culp Davis have recommended that lawmakers should seek "balance" between rule and discretion. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969). The concept of balance, however, depends to a large degree on the eye of the beholder.

Even further to the right would be a guidelines system where the departure power is worded in very restrictive terms (e.g., departures authorized only for reasons “not adequately considered by the commission”) or limited to a short list of enumerated factors.

To make a sentencing system incline even more decisively toward a rule-driven system, the legislature may choose to authorize especially vigorous appellate review of lower court sentences. In some states, of course, the appellate bench effectively abstains from the review of the merits of punishment decisions.¹⁷ In a jurisdiction that chooses to have a meaningful appeals process, however, critical questions arise. Should the appellate courts give great deference to trial court sentences? Substantial deference? Modest deference? Or none at all, as in *de novo* review? For some purposes, we might even ask appellate courts to scrutinize trial court decisions with skepticism, employing a presumption of *incorrectness*. This now occurs, for example, in Minnesota in cases in which trial judges have made extremely large jumps above the recommended guidelines penalty.¹⁸

Experience across multiple jurisdictions tells us that the most obvious mediating levers of sentencing authority—the trial courts’ departure power and the intensity of appellate review—are not the only factors that matter. Other critical variables include (1) the breadth or narrowness of statutory sentencing ranges and guidelines, (2) the simplicity or complexity of factual considerations that must be fed into guidelines calculations, and (3) the presence or absence of black-letter rules affixed to the sentencing process. Narrowed ranges, intricate guidelines considerations, and a rule-bound process all push toward the right on the rule-discretion continuum. In addition, the actual operation of a system depends on a number of informal or extra-legal factors, such as the culture within each jurisdiction’s judiciary and the political crosscurrents in relations between branches of government. These considerations will be discussed more fully in the following Part.

II. ENFORCEABILITY IN THE CURRENT FEDERAL SYSTEM

Booker called the new system of Federal Guidelines—as forged in the Court’s remedial opinion—“advisory” Guidelines. Although there were many separate opinions and points of view in *Booker*, all nine Justices agreed that a system of sentencing prescriptions, if characterized as “advisory,” does not

17. See Reitz, *supra* note 13, at 1443-46.

18. See, e.g., *State v. Spain*, 590 N.W.2d 85, 89 (Minn. 1999) (holding that aggravated durational departure of more than twice the presumptive prison term will be reversed on appeal absent extraordinary justification). Proposed drafting for the revised Model Penal Code would also employ such a heightened standard of review for some appellate issues, such as review of a trial court’s decision (separately authorized under the proposed Code) to impose a sentence below the terms of a mandatory minimum penalty. See MODEL PENAL CODE §§ 7.XX(3)(b), 7.ZZ(6)(d) (2004) (Sentencing Preliminary Draft No. 3, 2004).

trigger the Sixth Amendment requirements of jury fact-finding at sentencing and the reasonable doubt standard of proof.¹⁹ As a matter of constitutional doctrine, an advisory system escapes the new and potentially cumbersome constitutional requirements for the sentencing process announced by the Court in such cases as *Apprendi*, *Ring*, *Blakely*, and *Booker*'s merits opinion.²⁰ The reader should put aside for the moment any nagging questions of why consequential fact-finding in some sentencing schemes should trigger the protections of the Sixth Amendment, while other systems get a free pass. This question is complex, and the answers given by the Justices are not satisfactory.²¹ The relevant observation here is that, in order to save the Federal Sentencing Guidelines from the baggage of jury sentencing trials, five members of the Court were obliged to refashion them as "advisory" Guidelines. A policymaker need not be confounded by this terminology, however. It is fair to ask: Just how advisory are the *Booker*-ized Federal Guidelines?

In order to make this assessment in an informed manner, it is useful to return to the rule-discretion continuum displayed in Figure 1. Using this tool, we can take the measure of the *Booker*-ized Federal Guidelines by comparing them with the amount of rule enforceability currently found in a number of state guidelines systems.

Figure 2 lays out five paradigmatic sentencing systems on the continuum. Moving from left to right, we have already observed that no American sentencing system in recent history is so purely advisory as to merit a ranking of zero on the ten-point scale. Still, some guidelines (and other) systems come close. In several states that employ advisory guidelines, a sentencing judge may deviate from the guidelines at will, without responsibility to give any statement of reasons. Jon Wool and Don Stemen, in a recent publication for the Vera Institute, have denoted these as "fully voluntary" guidelines—demonstrating that we are all struggling toward a new use of language in the post-*Blakely* era. Jurisdictions taking this approach include Missouri and the District of Columbia.²² In terms of judicial authority, these systems come very close to the traditional indeterminate sentencing framework, under which judges may pronounce any penalty they see fit to pronounce within statutory boundaries, with no burden of explanation. Unless a judge is foolish enough to make a gratuitous statement on the record that demonstrates the use of an impermissible consideration such as race or religion, there is no realistic

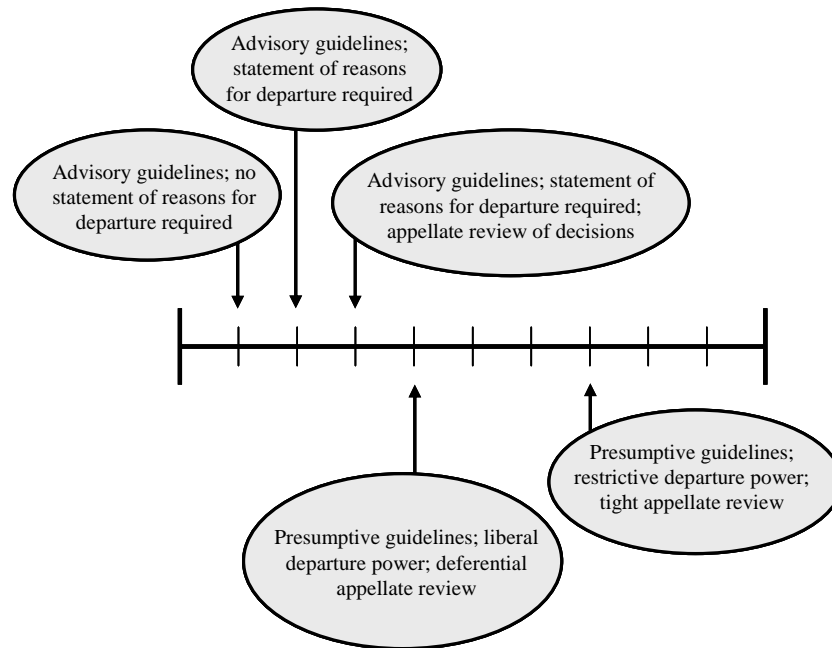
19. See *United States v. Booker*, 125 S. Ct. 738, 750 (2005) (Stevens, J.); *id.* at 764 (Breyer, J.).

20. In addition to *Booker*, 125 S. Ct. 738, see *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *Ring v. Arizona*, 536 U.S. 584, 602 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

21. For an extended critique of the Supreme Court's Sixth Amendment cases, see Reitz, *supra* note 6. For a rare defense of the Court's jurisprudence in this area, see Kyron Huigens, *Solving the Williams Puzzle*, 105 COLUM. L. REV. 1048 (2005).

22. Wool & Stemen, *supra* note 7, at 8.

Figure 2. Locating Sentencing Systems on the Continuum



prospect of reversal on appeal. On the ten-point scale of rule enforceability, such systems cannot be given a score greater than one.

Moving one increment to the right on the continuum, some states hold that their guidelines are advisory, and yet, they have instituted the legal requirement—usually in statute, and sometimes enforced by the appellate courts—that judges choosing not to impose a guidelines sentence in a given case must state or write an adequate explanation of their reasons. Virginia, Delaware, Arkansas, Maryland, and Utah follow this strategy.²³ Such systems impose a modest cost in time and trouble upon judges who elect a non-guidelines penalty. But there is also a form of mental discipline at work. By forcing judges to give reasons on the record, judges are required to think through the case perhaps more carefully than they otherwise would have done. A large part of this thought process must include grappling with the guidelines themselves. Such systems constrain trial judges a bit more than the so-called “fully voluntary” systems. They may be rated at position two on the rule-discretion continuum.

Yet a different kind of system emerges when a jurisdiction conjoins “advisory” guidelines, the requirement of reasoned explanations for departures, and a new third element of appellate review of the merits of resulting

23. See Wool & Stemen, *supra* note 7, at 3.

sentencing decisions. In a handful of guidelines jurisdictions, including Pennsylvania, Wisconsin, and—as of January 2005—the federal system, the substance of each final sentencing disposition is scrutinized for its “reasonableness” by the appellate bench.²⁴ In these systems, it is not a ground for reversal to show merely that a particular punishment fell outside the guidelines. Nor is there an express standard of review for the sufficiency of reasons that can justify a non-guidelines punishment. Either predicate for review would invest the guidelines with undeniable legal force. Instead, at least in Pennsylvania and federal law, the guidelines are held out as “considerations” that a sentencing judge must take into account and that appellate judges may also consult when adjudicating the slippery question of whether a lower court’s sentence was reasonable.²⁵ “Reasonableness” has *something* to do with the content of guidelines, evidently, but there is no necessary or precisely articulated linkage between the two. Such systems move at least one additional notch to the right on the rule-discretion continuum. They are depicted at position three on Figure 2.²⁶

Because the post-*Booker* Guidelines meet this description, it is worthwhile to pause and reflect upon further specifics. First, the actual operation of such systems will depend a great deal upon how the appellate courts perform their role of policing the reasonableness of individual sentences. For many years in Pennsylvania, for example, the appellate courts had all but abdicated their sentence-review powers.²⁷ In the last few years, however, the state’s superior court judges (one level below the Pennsylvania Supreme Court) have reinvigorated appellate sentence review.²⁸ A similar transformation may also be taking place in Wisconsin, where a recent supreme court decision put the state on notice that the appellate courts would, from now on, inject themselves into sentencing appeals despite decades of past neglect.²⁹ Pennsylvania and Wisconsin, if one credits the latest appellate court pronouncements, may

24. See *State v. Gallion*, 678 N.W.2d 197 (Wis. 2004); *Commonwealth v. Walls*, 846 A.2d 152 (Pa. Super. Ct. 2004), *appeal granted*, 875 A.2d 1075 (Pa. 2005).

25. *Walls*, 846 A.2d at 156.

26. Tennessee now falls in line with the systems described in text. With legislation signed into law on June 7, 2005, Tennessee’s formerly presumptive sentencing guidelines are now advisory. Yet, the new legislation spurs the state’s appellate courts into action with an intriguing appellate review standard that sends something of a mixed signal. It instructs the appellate courts to exercise *de novo* review over sentencing rulings below, while at the same time extending a presumption of correctness to those rulings. See 2005 Tenn. Pub. Acts 353 (amending TENN. CODE ANN. tits. 39, 40 & 55).

27. See Reitz, *supra* note 13, at 1471-81.

28. In addition to *Walls*, 846 A.2d at 152, see *Commonwealth v. Mola*, 838 A.2d 791 (Pa. Super. Ct. 2003). The legal status of the Pennsylvania guidelines is not clear even in the superior court opinions, however. The advisory character of the guidelines was stressed recently, for example, in *Commonwealth v. Bromley*, 862 A.2d 598, 603 (Pa. Super. Ct. 2004) (upholding state guidelines against a *Blakely* challenge on the grounds that guidelines are merely advisory to trial courts and hold no force of law).

29. *Gallion*, 678 N.W.2d at 206-07.

deserve a ranking at position three of the rule-discretion continuum. But, five or ten years ago, they clearly did not. Even though the formal law in both states authorized meaningful appellate sentence review, this review was not in fact occurring. In the recent past, therefore, it would have been more accurate to rate the Pennsylvania and Wisconsin systems at position two of the continuum, not three.

On the other hand, an appellate bench that took up the cudgel of reasonableness review with earnestness would move the entire system to the right of position three on the rule-discretion scale. Professor Albert Alschuler, for example, has speculated that the federal courts of appeals might treat any district court sentence within the *Booker*-ized Guidelines as presumptively reasonable and might decide to require “reasonable reasons” to support a non-Guidelines penalty.³⁰ Or, as Judge Cassell of the District of Utah has opined, the Guidelines might be treated as “heavy” considerations in overall sentencing decisions,³¹ with the degree of weight to be as great as possible without actually rendering the Guidelines legally enforceable in their own right. Or, to proffer a third alternative of my own, the federal courts of appeals could merely set a strong tone in sentence appeals, without articulating a fixed (and constitutionally dangerous) standard of review keyed to the Guidelines. If the circuit courts overturn non-Guidelines sentences with anything approximating the rate of reversal prior to *Booker*, district court judges will soon get the message that the Federal Guidelines remain terribly important. Actual practice will matter much more than the terminology used to advertise the system.

Under any of the above-mentioned alternatives, it is within the power of the federal courts of appeals to move the post-*Booker* federal system rightward on the rule-discretion continuum, and the distance of movement could be one, two, or several stops. My own prediction, and early post-*Booker* cases from the Second, Fifth, and Eighth Circuits bear this out,³² is that there is no chance that the federal appellate bench will completely abdicate its sentence review responsibilities as occurred for many years in Pennsylvania and Wisconsin. Thus, the *Booker*-ized regime will, at a minimum, fall at position three on the continuum. We simply do not know enough, however, about the future collective behavior of the courts of appeals to gauge the long-term effect of this variable. I would be willing to wager, with some confidence, that reversal rates

30. E-mail from Albert W. Alschuler, Professor, University of Chicago, to the Author (Feb. 7, 2005) (on file with author). Professor Alschuler is not an advocate for such a scheme.

31. *United States v. Wilson*, 350 F. Supp. 2d 910, 925 (D. Utah 2005) (Cassell, J.) (“[T]he court will give heavy weight to the recommended Guidelines sentence in determining what sentence is appropriate. The court, in the exercise of its discretion, will only deviate from those Guidelines in unusual cases for clearly identified and persuasive reasons.”).

32. *See United States v. Mashek*, 406 F.3d 1012 (8th Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) (as amended).

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will be measurably lower under the post-*Booker* Guidelines than before. If so, the *Booker*-ized system will not come to rest at the same point on the continuum as the pre-*Booker* system (position seven, as I will argue later in this Article), but somewhere in between—maybe position four, five, or even six.

There are still further reasons to think that the post-*Booker* Guidelines will, in practice, move to the right of position three on the rule-discretion scale. In addition to the system characteristics just discussed, the *Booker*-ized Guidelines still communicate very narrow sentencing ranges for specific cases and still require a more intricate factual analysis by sentencing courts than any other system in the history of American punishment. To say that the Pennsylvania guidelines must be “considered” by trial courts, for example, is not to lay down a heavy intellectual burden. The Pennsylvania guidelines are simple to navigate (the state’s manual is a mere 15 pages compared to 600 or so pages in the most recent Federal Guidelines Manual).³³ In contrast to the Federal Guidelines, the Pennsylvania guidelines contain few loss or quantity calculations, few guidelines factors to consider beyond the offense of conviction and criminal history, no relevant conduct provision, and no lists of approved, discouraged, or forbidden departure factors. Pennsylvania’s guidelines penalties themselves are also slightly broader in their recommended ranges than those found in the tightly woven Federal Guidelines grid. In short, a trial judge in Pennsylvania may finish “considering” the state’s guidelines in a matter of minutes and may find in many cases that the breadth of suggested penalties allows for the sentence the judge would have given independently. In contrast, in the post-*Booker* federal system, especially in a complex case, a judge may spend hours or days working through the Guidelines, with much detailed and contested evidence to be heard along the way.

A trial court’s duty to work through the formal rules of Federal Guidelines calculations is not optional. That is to say, it will ordinarily be reversible error in the post-*Booker* federal system for a district court to consider the wrong Guidelines section, miscalculate criminal history or multiple count scoring, fail to take into account relevant conduct demonstrated by the government by a preponderance of the evidence, misapply the Guidelines’ departure rules, and so on.³⁴ Whether the sentencing court has followed or rejected a botched-up Guidelines calculation will make little difference. Reversal and remand must normally follow because federal law demands that the judge consider the authentic recommendation of the Commission, not a false substitute.³⁵

Of course, the statutory mandate that judges run the gauntlet of the Federal Guidelines does not formally change the fact that, at the end of the day, the

33. See PENN. SENTENCING GUIDELINES MANUAL (2005) (consisting of fifteen pages and fourteen sections), <http://pcs.la.psu.edu> (last visited Aug. 24, 2005); U.S. SENTENCING GUIDELINES MANUAL (2004) (weighing in at 641 pages), <http://www.ussc.gov/2004guid/TABCON04.htm> (last visited Aug. 24, 2005).

34. See, e.g., *Crosby*, 397 F.3d at 103; *Mares*, 402 F.3d at 511.

35. 18 U.S.C. § 3553(a)(4), (5) (2005).

Guidelines prescription remains a recommendation rather than a binding command. Yet, the insistence within the system that the difficult process be performed with exactness must carry psychological force. Why bother with labyrinthine calculations—and why go to the trouble to enforce their accuracy—if they can be lightly discarded by sentencing judges? Important officials like federal judges are not accustomed to idle exercises of great effort and no consequence. The very fact that there are many legal rules attending the use of the Guidelines can only enhance the weight they carry in ultimate decisions.

Before leaving the subject of the location of the *Booker*-ized Federal Guidelines on the rule-discretion continuum, it is essential to mention that extra-legal incentives play an overlooked role in determining how “advisory” or “mandatory” a sentencing system will be in its actual operation. In Virginia, for instance, sentencing guidelines are purported to be “discretionary” or “voluntary.”³⁶ Although trial judges must give reasons for departure, there is no meaningful appellate enforcement of guidelines prescriptions.³⁷ On Figure 2’s continuum of enforceability, then, Virginia would appear to earn a spot at position two. In reality, however, Virginia’s guidelines have more potency than this analysis suggests. Trial judges in Virginia are elected by the state legislature, and their terms in office are renewed by the legislature. The state’s judges believe that the legislature is invested in the guidelines and that lawmakers look askance at judicial departures. Accordingly, trial judges in Virginia think carefully before deviating from the state’s “voluntary” guidelines.³⁸

Extra-legal incentives are not unique to Virginia. In Pennsylvania, as in some other states, the sentencing commission has concluded that it is legally obliged to release judge-specific sentencing data to members of the public and the press.³⁹ Observers of the Pennsylvania system, where the state supreme court has declared the guidelines to be “advisory,” believe that the possibility of public exposure of departure rates—which have theoretical impact on retention elections—has shored up judicial respect for the state’s guidelines.⁴⁰

36. See VA. CODE ANN. §§ 17.1-801, 17.1-803(1) (Michie 2004); VA. CRIMINAL SENTENCING COMM’N, 2004 ANNUAL REPORT 17 (2005) (“In the Commonwealth [of Virginia], compliance with the truth-in-sentencing guidelines is voluntary.”).

37. Richard Kern, *Sentencing Reform in Virginia*, 8 FED. SENT’G REP. 84 (1995).

38. See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 893, 916-18, 943 (2004).

39. See Paul J. Hofer & William P. Adams, *Guest Editors’ Observations, Using Data for Policymaking, Litigation, and Judging*, 16 FED. SENT’G REP. 8 (2003).

40. See Mark Bergstrom & Joseph Sabino Mistick, *The Pennsylvania Experience: Public Release of Judge-Specific Sentencing Data*, 16 FED. SENT’G REP. 57 (2003) (“One of the purposes of the [Pennsylvania] guidelines is to promote uniformity in sentencing, and the release of judge-specific sentencing information may further that purpose by discouraging judges from departing without articulating defensible reasons on the guideline form.”) (internal citation omitted).

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It is hard to picture an effective attack on a trial judge's record from an advocacy group, or a newspaper editorial, premised on the fact that the judge has adhered too often or too closely to the state's sentencing guidelines.

In the post-*Booker* federal system, extra-legal incentives are likewise at work. Although Congress can remove federal judges only with difficulty, the legislative branch does hold a powerful threat over the judiciary in the domain of criminal sentencing. Congress could at any time replace the *Booker*-ized Federal Guidelines with a matrix of mandatory minimum penalties or some other wholly new sentencing regime that would eliminate all vestiges of judicial sentencing discretion.⁴¹ The mere threat that this might happen, by itself, injects a powerful congressional presence into the operation of the *Booker*-ized system. Judges cognizant of recent sentencing legislation are well aware that Congress has been concerned with the issue of Guidelines compliance and has been especially sensitive to the prevalence of downward departures. The PROTECT Act of 2003 transmitted this message loud and clear,⁴² and some post-*Blakely* and post-*Booker* legislative proposals have sounded similar themes.⁴³

A judiciary sensitive to the prospect of congressional discipline is more likely to give careful and respectful consideration to "advisory" guidelines than a judiciary wholly unconscious of legislative oversight. If we assume that federal judges are politically astute, they know full well that Congress is watching the post-*Booker* sentencing system like a hawk, and they also know what issues Congress most cares about. If these considerations influence the sentencing practices of large numbers of judges, we would expect general sentencing patterns under the *Booker*-ized Guidelines to track pre-*Booker* patterns, and we would expect district court judges to depart more freely in the direction of severity than lenity. In the early months following the *Booker* opinion, data from the U.S. Sentencing Commission suggest that this has been

41. For a discussion of some of the options, see Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217 (2005) (in this Issue); Reitz, *supra* note 6; Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 31-32 (2005) (in this Issue).

42. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (PROTECT Act) of 2003, Pub. L. No. 108-21, 117 Stat. 667 (codified as amended in scattered sections of U.S.C.) (also known as the "Feeney Amendment").

43. See, for example, the "Bowman proposal," which would limit district court discretion to depart below the Guidelines while granting judges unconstrained authority to fix sentences above the Guidelines, up to the statutory maximum for each offense. See Frank Bowman, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing Guidelines into Conformity with Blakely v. Washington*, 16 FED. SENT'G REP. 364 (2004). A more recent proposal, introduced in the U.S. House of Representatives, would eliminate virtually all district court discretion to depart below the Guidelines. See *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005*, H.R. 1528, 109th Cong. § 12 (2005) (approved by the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security, Apr. 12, 2005).

happening in many federal courtrooms.⁴⁴

Putting all of these observations together, it is highly unlikely that the post-*Booker* federal system will settle into position three on the rule-discretion continuum. Odds are good that the system will come to rest closer to position four, five, or even six on the ten-point scale. The greatest unknown factor, which will do the most to settle the system at one location or another, will be the intensity of appellate sentence review carried out by the courts of appeals under the reasonableness standard.

Assuming this analysis is sound, the *Booker*-ized Federal Guidelines remain just as enforceable as any system of state sentencing guidelines on the national stage, or more so. In order to understand why this is the case, it is necessary to evaluate existing state “presumptive” guidelines systems on the ten-point rule-discretion scale.

A number of states have given express legal force to their sentencing guidelines, including (by chronological order of adoption) Minnesota, Washington, Oregon, Tennessee, Kansas, North Carolina, Ohio, and Michigan.⁴⁵ These are usually classified as “presumptive” guidelines—although they are occasionally misdescribed as “mandatory.” The initial guidelines calculation, usually based on offense of conviction and criminal history, leads the court to a range of sentencing options. In most states, the presumptive range is quite narrow. The sentencing judge is not tightly bound to stay inside the range, however, in any of the states. If a judge feels there are articulable reasons in an individual case that call for a non-guidelines penalty, all “presumptive” jurisdictions grant leeway for imposition of a mitigated or aggravated sentence.⁴⁶

The critical question is how much leeway. And, on this point, an important indicator is the probability of reversal following a non-guidelines sentence. One study in the mid-1990s found that appellate courts under state guidelines (including those in Minnesota, Oregon, and Washington) were, on the whole, deferential to trial courts’ sentencing decisions.⁴⁷ If the vast majority of departure sentences are not candidates for reversal, the sentencing judge generally has the last word over formal rulemakers. As a report published by the American Law Institute recently concluded, in sentencing systems adhering to the Minnesota model, “the trial court has more power to deviate from the

44. See Memorandum from Linda Drazga Maxfield, Office of Policy Analysis, U.S. Sentencing Comm’n, to Judge Hinojosa, Chair, U.S. Sentencing Comm’n, Regarding Numbers on Post-*Booker* Sentencings: Data Extract on April 5, 2005 (Apr. 13, 2005) (finding overall post-*Booker* compliance rates with Federal Guidelines similar to rates in the fiscal year prior to *Booker*, although “above-Guidelines” sentences have more than doubled from 0.8% to 1.8% of all sentences), http://www.ussc.gov/Blakely/booker_041305.pdf (last visited Aug. 24, 2005).

45. See ALI, MODEL PENAL CODE REPORT, *supra* note 2, at 133-35.

46. See *id.* at 50-63.

47. Reitz, *supra* note 13, at 1493-98.

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commission's guidelines than the commission has power to prevent such a thing from happening."⁴⁸

Accordingly, the state presumptive guidelines systems fall on the left-hand side of the rule-discretion continuum. By design, judges hold greater authority than other official actors over final sentencing outcomes in particular cases. And yet, the judiciary's power is shared with rulemakers to an appreciable degree. If lawmakers were to tighten the departure standard, or the rules of appellate review, the sentencing commission would quickly come to dominate the trial bench—as we shall see shortly in the analysis of the pre-*Booker* federal system.

Because “presumptive” sentencing guidelines, at least at the state level, provide substantial latitude for judicial deviation, they are not sharply distinguishable from some “advisory” guidelines that use mechanisms short of legal enforceability per se to encourage judicial compliance. The state presumptive systems fall at or near position four on the rule-discretion continuum. We may quibble over decimal points—Minnesota may be a 4.5 while Washington is a 4.2—but no state has crossed the threshold of position five to author a framework that suppresses judicial discretion below the level of primary importance in the system.

These observations suggest that the *Booker*-ized Federal Guidelines, in their practical enforceability, will fall—at a minimum—very close to the most restrictive guidelines among those created by the states in the past twenty-five years. If it is useful to consult national norms for the design of sentencing systems, the post-*Booker* setup is now squarely in the mainstream. Indeed, as speculated earlier, there is a good chance that the current federal law will shoot further to the right than any state on the rule-discretion continuum.

At the same time, however, there is little doubt that the post-*Booker* federal sentencing system does not incline as far toward the “mandatory” extreme of the continuum as did the pre-*Booker* system. In order to quantify the change wrought by the Court, it is necessary to ask where the prior federal law fell on the ten-point scale.

The old system warranted a score of at least seven. It was nowhere close to being a ten. While most observers of the pre-*Booker* system portrayed it as a “mandatory” Guidelines regime, district court judges still found ways to give departure sentences in a meaningful number of cases. The U.S. Sentencing Commission's most recent report, collecting pre-*Booker* data for fiscal year 2003, found overall departure rates of 30.5%.⁴⁹ Many of these departures, of course, went unopposed by the parties—and some were explicitly invited by the terms of plea agreements or by the government's acknowledgement that a

48. ALI, MODEL PENAL CODE REPORT, *supra* note 2, at 60.

49. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.26 (2005), <http://www.ussc.gov/ANNRPT/2003/table26.pdf> (last visited Aug. 24, 2005).

defendant had given substantial cooperation to an ongoing investigation.⁵⁰ The point remains that the old federal system did not run in lockstep across all cases.

Still, federal trial judges under pre-*Booker* law had far less room to maneuver than their counterparts in state guidelines systems. The legislative history of the Federal Guidelines, recounted at length by Kate Stith and José Cabranes in their book *Fear of Judging*,⁵¹ reveals that a driving principle throughout the creation of the Guidelines was the sharp reduction of judicial sentencing discretion. Stith and Cabranes are not alone in the conclusion that the drafters of the original Guidelines succeeded admirably in this intention.⁵² One comparative study found that in 1995 the odds of a federal district court Guidelines departure being reversed on appeal were three to seventeen times greater than the odds of reversal in “presumptive” guidelines states such as Minnesota, Oregon, and Washington—and about fifty times greater than in Pennsylvania.⁵³ Such high probabilities of reversal had profound effects on district court judges. Many have complained over the years that the Federal Guidelines have drained out the human element of the sentencing process and have substituted a system of sentencing “by computer.”⁵⁴

There is little question that the restrictiveness of federal sentencing law oscillated to some extent both up and down between 1987 and 2005 and that actual practices differed from one region of the country to another. In 1996, for example, the Supreme Court loosened the standard of appellate review for departure cases in *Koon v. United States*.⁵⁵ Although the various courts of appeals differed in their interpretations of *Koon*, there seems little doubt that the overall impact of the case was to inject a new increment of trial judge discretion into the federal machinery.⁵⁶ In 2003, however, Congress overturned the *Koon* decision and replaced the Court’s deferential standard of appellate review with a de novo standard on the ultimate issue of the permissibility of departure.⁵⁷ This action by Congress, and other features of the PROTECT Act

50. *See id.* at tbl.25.

51. KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 38-77 (1998).

52. *See id.* at 99-103; *see also* Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

53. Reitz, *supra* note 13, at 1497-98.

54. For an extensive collection of criticisms of the Federal Guidelines by federal judges, *see* STITH & CABRANES, *supra* note 51, at 78-103.

55. 518 U.S. 81 (1996).

56. *See, e.g.*, Barry L. Johnson, *Discretion and the Rule of Law in Federal Guideline Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States*, 58 OHIO ST. L.J. 1698 (1998); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1229, 1238 (2003).

57. *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (PROTECT Act) of 2003, Pub. L. No. 108-21, 117 Stat. 667 (codified as amended in

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of 2003, pushed firmly in the direction of narrowing judicial sentencing discretion.

In overall assessment, there can be little doubt that the pre-*Booker* federal system was, from its inception, the one sentencing system in the nation that clearly gave greater precedence to predetermined rules than to judicial discretion to individualize penalties. It is, therefore, the only system in the recent history of American sentencing that must be placed on the right half of the rule-discretion continuum, beyond the tipping point of position five where we imagine judicial discretion and the power of sentencing rules to be in exact balance.

As we have seen, however, the post-*Booker* federal system may still be the most restrictive of any existing American framework in actual practice and may also remain to the right of position five on the rule-discretion scale. The long-term effect of *Booker* is not yet knowable, but informed conjecture suggests that the impact might not be dramatic. Before Congress decides whether and how to act, it would be wise to assess carefully the true stakes of the debate. Has the federal system moved from position seven on the continuum to position three? That would be a large change indeed—although not as big a jump as might have been supposed in the early days following the *Booker* decision. Such a significant alteration of the system would merit a second look by Congress. On the other hand, with a bit of time, we may see that the system has moved only from position seven to position six. If so, many members of Congress may see little benefit in a whole-system overhaul, with attendant risks and uncertainties. As discussed in the final Part, the best congressional strategy for the moment may be one of surgical adjustment of the *Booker*-ized system.

III. POLICY IMPLICATIONS

No member of Congress should work to overhaul the post-*Booker* Guidelines on the theory that they herald a return to the bad old days of fully discretionary judicial sentencing or on the theory that the new “advisory” Guidelines are extremely permissive compared with norms in guidelines sentencing systems nationwide. No matter how one resolves the uncertainties about the future operation of the *Booker*-ized Guidelines, they remain as restrictive of judicial sentencing discretion as any system in the United States. There is a good chance they will continue to operate as the most rule-bound sentencing regime in the nation, even without legislative intervention.

At the same time, there is little question that the Supreme Court has rendered the Federal Guidelines less “mandatory” than they were before. The actual impact of the Court’s remedial ruling in *Booker* is not yet certain, and the future behavior of the courts of appeals will determine a great deal about the system’s mandatory or discretionary character in the years to come.

scattered sections of U.S.C.) (also known as the “Feeney Amendment”).

Congress, if it chose, could speak to the issue of appellate sentence review as a way of biasing the system toward greater rule enforceability. After *Booker*, the Court told us that 18 U.S.C. § 3742 implicitly authorizes the circuit courts to overturn a sentence that is not reasonable,⁵⁸ but neither the statute nor existing case law gives much content to the nature of “reasonableness” review.⁵⁹ Here, legislation could fill in the blanks—or could substitute new terminology altogether. For example, an amendment to § 3742 could specify that the appellate courts are to grant only modest deference to district court sentencing decisions that are based on contestable applications of the sentencing considerations in 18 U.S.C. § 3553(a). Matters of law—such as the proper reading of Guidelines provisions—could remain subject to de novo appellate review. Congress could also provide that, among the factors listed in § 3553(a), the appellate courts are to give particular weight to subsection (6), setting forth a strong legislative policy “to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”⁶⁰ That subsection itself could even be amended to provide that, in most cases, “the recommended penalties in sentencing guidelines shall be used as benchmarks for analysis in the selection of penalties to avoid unwarranted disparities across cases.”⁶¹ All of these measures would shore up the Guidelines without crossing the line—admittedly a very formalistic line created by the Court—of investing the Guidelines explicitly with force of law.

A legislative focus on the appellate review provision would avoid the unknowns of reengineering the entire federal sentencing scheme. For example, the history of mandatory sentencing enactments suggests that they are actually more productive of sentencing disparities than the uniformity they purportedly seek.⁶² An entire system supported by a matrix of mandatory punishments would be a breathtaking experiment. No expert in the world has any idea how it would function in practice. Nor is it clear that such a system would be constitutional under the Supreme Court’s evolving Sixth Amendment jurisprudence. As many have observed, the Court’s decision in *Harris v. United States*,⁶³ holding that judicial fact-finding in support of enhanced minimum penalties does not offend the Constitution, is a decision supported by a

58. *United States v. Booker*, 125 S. Ct. 738, 765 (2005) (Breyer, J.).

59. *See, e.g., United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (as amended) (declining to speak to content of reasonableness review; preferring to leave the matter for evolution in future decisions).

60. 18 U.S.C. § 3553(a)(6) (2005).

61. I am indebted to Michael Dreeben for inspiring this last thought—although Mr. Dreeben, to my knowledge, has not proposed this as legislative language. Remarks of Michael R. Dreeben, Fifth Circuit Judicial Conference, Plenary Session, *Blakely, Booker, and Beyond*, New Orleans, La. (May 3, 2005) (on file with author).

62. *See* MICHAEL TONRY, SENTENCING MATTERS ch. 5 (1996); U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ii-iii, 53-54 (1991).

63. 536 U.S. 545 (2002).

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threadbare five to four majority, with Justice Breyer wavering in his fifth vote.⁶⁴ While we know that all nine members of the Supreme Court consider the *Booker*-ized Federal Guidelines to be a constitutional system,⁶⁵ the Court remains unreadable on a host of critical issues in its evolving Sixth Amendment jurisprudence.⁶⁶ Wholesale revision of federal sentencing laws or procedures would be a step back into the constitutional minefield that yielded *Booker* in the first place.

CONCLUSION

This Article suggests that the reordering of federal sentencing in *United States v. Booker* was far less radical than it first appeared. It is all too tempting to read *Booker* as a revolutionary opinion that swung federal sentencing law from the extreme of a “mandatory” system to the opposite extreme of an “advisory” system. In fact, the pre-*Booker* system was never as mandatory as sometimes portrayed, and the new characterization of the system as advisory is a shibboleth. The use of words in legal opinions is often far different from their colloquial meanings. In matters of important public policy, it is essential that confused terminology and infighting among the Justices not blind Congress to reality or to the wisdom of measured reaction. *Booker* may not have changed a great deal in federal sentencing, and if it has, it may take little more than an adjustment to the *Booker*-ized system to mute the impact of the Court’s action.

64. Justice Breyer stated in *Harris* that he “cannot easily distinguish [*Apprendi*] from this case in terms of logic.” *Id.* at 569 (Breyer, J., concurring in part). Explaining his vote even so, he said that “I cannot yet accept [*Apprendi*’s] rule.” *Id.* A common reading of Breyer’s opinion is that, at the time, he was waging a defensive battle to shield the Federal Sentencing Guidelines from successful attack under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See Emily Bazelon, *Locked In*, BOSTON GLOBE, Aug. 1, 2004, at D1. After the writing of this Article, Justice O’Connor announced her retirement from the Court, and Chief Justice Rehnquist passed away. These events plunge *Harris* further in doubt, as there is no way to predict—especially in such a fractured jurisprudence—whether new Justices will continue the Rehnquist and O’Connor positions within the slim *Harris* majority or will join the four *Harris* dissenters (and possibly Justice Breyer) to overturn the decision.

65. See *supra* note 19 and accompanying text.

66. See Reitz, *supra* note 6.

