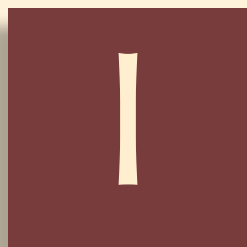


An interview with

MICHAEL O'HEAR

A year after Booker—has anything changed?



In its January 2005 decision in *United States v. Booker*, the Supreme Court held that the existing federal sentencing guidelines system was unconstitutional. Greeted with a mixture of excitement, confusion, and consternation, *Booker* quickly spawned a host of conflicting lower court decisions, outspoken criticism from Congress and the Department of Justice, and a small mountain of law review articles. In this Q & A, Marquette Law School Professor Michael M. O'Hear, a nationally recognized expert on federal sentencing, talks about the aftermath of *Booker*.

What exactly did the Supreme Court decide in *Booker*?

In 1984, Congress created the United States Sentencing Commission and authorized the Commission to promulgate new guidelines that would bind federal judges at sentencing. Prior to the guidelines, federal judges had virtually unlimited discretion to sentence within broad statutory ranges, giving rise to concerns over unwarranted disparities in the treatment of similarly situated offend-

ers. The new guidelines system, however, proved equally controversial. While many states have since adopted sentencing guidelines, no jurisdiction has guidelines that are as voluminous, complex, and rigid as those in the federal system. The guidelines specify precise weights to be given to thousands of different sentencing factors. If there are any disputes relating to those factors, the sentencing judge does whatever fact finding is necessary using the preponderance-of-the-evidence standard.

Before *Booker*, the Supreme Court had upheld the guidelines system against a variety of constitutional challenges. In 2000, however, the Court opened the way for a new line of attack. That year, in *Apprendi v. New Jersey*, the Court invalidated a sentence under a state hate crimes statute that—like hundreds of thousands of federal sentences since the 1980s—was also based on judicial fact finding using the preponderance standard. The Court held that the hate crimes sentencing scheme in New Jersey violated the defendant’s constitutional rights to jury fact finding using the beyond-a-reasonable-doubt standard. In essence, *Booker* simply extended *Apprendi* to the federal system, holding that (subject to a few exceptions) only a jury may find the aggravating facts that increase a defendant’s sentencing exposure pursuant to mandatory guidelines.

So juries now have a role in federal sentencing?

You would think that, but no. The Court was badly divided in *Booker* and its companion case and, oddly enough, produced two different 5–4 majority opinions. Only Justice Ginsburg joined both. The first, referred to as the “merits opinion,” held the pre-*Booker* system unconstitutional. The second, referred to as the “remedial opinion,” fixed the constitutional problems not by mandating jury fact finding, but by excising two provisions from the 1984 Sentencing Reform Act. As a result of these statutory changes, the federal guidelines have been transformed from mandatory to “advisory” (that is, non-binding). Under the new system, judges still perform all of the fact finding they used to do, but—under the Court’s reasoning—the Constitution is not violated because the finding of an aggravating fact no longer results in an automatic increase in the sentence length to which a defendant is exposed.



If all of this sounds bizarrely incoherent to you, believe me, you are not alone. Think about it. The pre-*Booker* system was overturned because it gave judges too much power relative to juries. And the remedy was . . . to keep juries out of the process and give even more power to judges!

Does this mean that we have returned to the bad old days of unlimited judicial discretion at sentencing?

No. In fact, while *Booker*’s logic may be far short of compelling, the system produced by *Booker* embodies just the sort of balanced approach to judicial discretion that most sentencing scholars favor: more flexible than the old mandatory guidelines, but with clearer benchmarks and more rigorous procedures than the pre-guidelines system.

For instance, while the guidelines are no longer strictly binding, the Court left in place a provision of the Sentencing Reform Act that requires the sentencing judge to “consider” the guidelines. As the courts of appeals have indicated after *Booker*, this means that the sentencing judge must generally still calculate the guidelines sentence and explain any variance from it. Moreover, sentences may be appealed by either the defendant or the government, and overturned if “unreasonable.”

What would make a sentence “unreasonable”?

Unfortunately, *Booker* had almost nothing to say about this, leaving a difficult question in the hands of the lower courts. More than a year later, the case law is still evolving, but some notable patterns are emerging. For one thing, it appears that a sentence within the guidelines range will rarely, if ever, be found unreasonable. Indeed, several circuits have explicitly recognized a “presumption of reasonableness” as to guidelines sentences. On the other hand, the appellate courts have already overturned numerous outside-the-guidelines sentences. Some of these decisions seem to suggest that a “variance” will always be found unreasonable unless the district court identifies something factually unusual about the case that would justify a non-guidelines sentence.

Some commentators are troubled by these trends in the courts of appeals, which seem to treat the guidelines as very nearly mandatory. Arguably, the courts of appeals have already gone a long way towards undoing *Booker*.

Have actual sentencing results been affected by *Booker*?

Yes, data collected by the Sentencing Commission suggest that *Booker* has already affected many thousands of federal sentences. At the same time, it is hard to say whether *Booker* has really produced the sort of revolution in federal sentencing that was feared by some and eagerly anticipated by others. For one thing, most of the data reflect sentences imposed before the emergence of the “reasonableness” jurisprudence discussed above. For another, the number of *Booker* variances is still dwarfed by the number of within-the-guidelines sentences. Indeed, the number of *Booker* variances is also exceeded by the number of variances on grounds that were recognized even before *Booker* as valid bases for a below-the-guidelines sentence, such as providing substantial assistance to the authorities in apprehending another offender. In all, about 62 percent of post-*Booker* sentences have been

within the guidelines, as compared to about 69 percent in 2003, the last full year prior to *Booker* and *Blakely v. Washington* (a precursor to *Booker* that also affected federal sentencing practices in some districts).

In response to the data, some critics of judicial discretion in Congress and the Department of Justice have decried what they characterize as increased disparity and unwarranted lenience post-*Booker*. But the data are equivocal. On the one hand, the vast majority of *Booker* variances have indeed taken the form of reduced sentences below the guidelines range. On the other hand, the overall average sentence length has actually increased since *Booker*. It is not entirely clear why sentence lengths have been increasing, but, in light of the trend, it is hard to conclude that *Booker* has substantially impaired federal crime-fighting capabilities.

Does *Booker* have implications for criminal sentencing in state courts?

Not directly. *Booker*'s most immediate precursor, the *Blakely* decision in 2004, had already suggested that many state sentencing schemes were in violation of the *Apprendi* principle. Because *Booker* itself focused on the unique history and structure of the federal system, the later decision added little to the analysis at the state level. *Blakely* issues are still being litigated in many state courts across the country, and the process of bringing all jurisdictions into compliance with *Apprendi* may yet continue for several years. Here in Wisconsin, though, we had an advisory guidelines system in place even before *Booker*. As a result, our own state courts will not likely be much affected by the *Apprendi/Blakely/Booker* trilogy.

How will Congress respond to *Booker*?

The Attorney General and the Chairman of the House Judiciary Committee have both been outspoken critics of post-*Booker* sentencing trends. Given their views, as well as the typical dynamics of tough-on-crime politics in an election year, it is possible that Congress will take some action in the next few months to address the increased rate of below-guidelines sentences. For in-

stance, one proposal would convert the guidelines into a system of mandatory minimum sentences. This proposal would take advantage of a curious loophole in the *Apprendi* rule: under the Supreme Court's decision in *Harris v. United States* in 2002, the requirement of jury fact finding does not apply to mandatory minimums.

With its two new additions, will the Supreme Court now change course in sentencing law?

Although *Apprendi*, *Blakely*, and the *Booker* merits decision were produced by slim 5–4 majorities, all will likely withstand the recent changes in the Court's personnel. The two departed justices, Rehnquist and O'Connor, were dissenters in all three decisions, so their replacements—whose views on these matters remain uncertain—are unlikely to tip the Court's balance of power. On the other hand, *Harris*, which recognized the exception for mandatory minimums, is in danger. Both Chief Justice Rehnquist

and Justice O'Connor were part of a 5–4 majority in that decision. Thus, if either of the new Justices takes a different view of the issue, the four *Harris* dissenters might then become a majority. While Chief Justice Roberts and Justice Alito are expected to be relatively conservative jurists, such ideological

tendencies do not play out

in predictable ways in this area of the law. For instance, in *Harris*, Justice Scalia voted with the majority, but Justice Thomas sided with the dissent. In any event, if *Harris* were overruled, then Congress's range of options in responding to *Booker* would be substantially constrained.

What have you been doing to participate in the national debate over *Booker*?

It's a great time to be a sentencing scholar. We are witnessing the most dynamic period in national sentencing law since at least the 1980's. I have been trying to do my part to help lawyers, policymakers, and the general public sort out where we are now and where we should be going. I have spoken to numerous bar organizations on both the national and local level. I have written op-eds for the *Milwaukee Journal Sentinel* and fielded many questions from reporters. I have presented papers on *Booker* at academic conferences sponsored by Cornell and McGeorge law schools. I also have two forthcoming law review articles on *Booker*-related topics. In my capacity as an editor of the *Federal Sentencing Reporter*, the leading journal in the field, I helped to produce two entire issues focusing on the aftermath of *Booker*. Finally, I authored a letter to the House Judiciary Committee on behalf of more than 60 criminal law professors from around the country in opposition to what we felt was an over-hasty and ill-advised "*Booker*-fix" bill last spring. Fortunately, hearings on the bill were canceled after the receipt of our letter and similar statements of opposition from several other organizations of lawyers and judges.

Like most sentencing scholars, I am of the view that the United States imprisons too many nonviolent offenders for too long, at too great a cost to society. The United States has by far the highest per capita incarceration rate in the Western world. The federal guidelines system—which, before *Booker*, was less flexible and more severe than any state guidelines system—had long been an important part of the problem. Thus, while I have criticized the Supreme Court's legal reasoning in *Booker*, I have also written favorably of the bottom-line result. The new advisory system gives federal judges at least a little bit more flexibility to do what we have long entrusted state court judges to do in Wisconsin and most other jurisdictions in this country: craft suitable alternatives to long prison terms in cases where imprisonment is not necessary to protect public safety. •

