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Observations: Sentencing Guideline Law and Practice in a Post-Booker World

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Hon. Frank C. Damrell, Jr.**

In the pre-Sentencing Reform Act era, most Americans felt that the indeterminate sentence and the rehabilitative norm for punishment was a feeble response to the fast-rising tide of serious crime. In those years, there was a perception that the gap between justice and crime was getting wider and wider. There was a growing belief that judges and the criminal justice system were failing the American people. In fact, most people feared that if not checked by uniformly harsher sentences, criminals would overrun their communities. During those years there was, however, a virtual antidote to this national epidemic of frustration and fear.

Clint Eastwood.

On screen in the 60s and 70s, and early 80s, Clint Eastwood dealt swift, deserving punishment to vicious criminals with astonishing regularity. This icon of movie justice rode down evildoers sometimes with his last bullet. From the *Dollars Trilogy* to the *Dirty Harry* series, Eastwood delivered his personal form of capital punishment in a most satisfying manner for many Americans.[1] When Detective Harry Callahan, SFPD, spat "Go ahead, make my day" as he pointed his majestic .44 Magnum at the nose of a nasty thug, millions of Americans were enthralled, including President Reagan himself, who incorporated those very

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* This article should be cited as 37 MCGEORGE L. REV. 823 (2006). The editorial board of the McGeorge Law Review, Volume 37 would like to acknowledge Judge Damrell's generous nature, both in agreeing to draft this piece and in serving as the symposium's keynote speaker at the event's concluding dinner. Judge Damrell was enthusiastic in serving as a commentator on the United States' Sentencing Guidelines from a judge's perspective and in having his observations from the bench included with articles from Professor Erwin Chemerinsky of Duke Law School, eminent constitutional law scholar; Professor Michael Vitiello of the University of the Pacific, McGeorge School of Law, author of many articles regarding various sentencing issues; and Professor Deborah Young of Cumberland University's Samford School of Law, author of West's "Federal Sentencing Law and Practice."

The Judge's observations, meant to be included in the initial Symposium issue as a concluding thought on the Sentencing Guidelines, were inadvertently, and with great regret, omitted from the pre-publication issue sent to the printer. For that error, the editorial board of Volume 37: Joel Eisenberg, Editor-in-Chief; Matthew Lilligren, Chief Managing Editor; Kristen Cerf, Chief Technical Editor; Jody Hausman, Chief Comment Editor; Ana Frostic, Chief Articles Editor; Chelsea Olson, Chief Legislation Editor; and especially James Maynard, Chief Symposium Editor, extend our sincere apologies to District Court Judge Frank C. Damrell, Jr. and his dedicated staff.

** United States District Judge for the Eastern District of California. Judge Damrell celebrated ten years on the federal bench in 2007

1. *Dirty Harry* in turn spawned an entire genre of films in which rogue cops (played by actors such as Bruce Willis and Mel Gibson) outsmarted or completely ignored an assortment of fuzzy-minded politicians and law enforcement bureaucrats in order to wipe out entire legions of evildoers.

words in his own presidential persona. The days of indeterminate sentences and the rehabilitation norm were clearly numbered. Not long thereafter, with the enactment of the Sentencing Reform Act of 1984,[2] federal judges began to deliver the retributive punishment people wanted.[3]

Ironically, something began to happen in Clint Eastwood's films. His previous portrayals of deadly cowboy, tough cop justice started giving way to sobering and painfully sensitive reflections on crime and punishment. For example, in *The Unforgiven* (1992), after an ambitious young gunslinger shot and killed his first bad guy, he pleads for justification, "He sure had it coming!" William Munny (Eastwood), an old murdering gunslinger, slowly responds, "Kid, we all have it coming." The old avenger of injustice betrays a profound sense of guilt never seen before. Then in the Eastwood directed *Mystic River* (2003), a man, himself a childhood victim of violent abuse, confesses to a murder of a young woman he did not commit. He then is brutally executed by his friend, the young woman's father—hardly a satisfying ending for those seeking just retribution. Finally in *Million Dollar Baby* (2004), the crime itself, much less the punishment, is blurred if not erased. A fight manager (Eastwood), finally yields to the pleas of a young, horribly injured, quadriplegic prizefighter and disconnects her life support. She dies. The fight manager walks out of her room into the night, a free and apparently redeemed man.

> As is often the case, society began to change before politicians or the law recognized it. . . . In the shifting criminal justice sands of the turn of the twentieth century, the Court seized the opportunity to push back against legislative dominance in the criminal arena, motivated by a combination of institutional imperative, congruent individuals views on how the Constitution should read, and perhaps the view that severity had gone too far. It did not make for pellucid doctrine, but it is an example of how we regulate American criminal justice by recalibrating the relationships among the several players who share and balance power in our criminal justice system.[4]

This past year, the United States Supreme Court, compelled by the Sixth Amendment and the need to preserve the Federal Sentencing Guidelines, summarily excised the mandatory component of the Guidelines and returned considerable discretion to the district judge.

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2. Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1837, 1987 (codified as amended in scattered sections of U.S.C. titles 18 and 28).

3. However, Congress remained critical of the courts' failure to always adhere to the mandatory sentence of the Guidelines by granting downward departures from the Guidelines. This criticism reached a crescendo in 2003 with the adoption of the Feeney Amendment, mandating strict enforcement of the Guidelines in cases involving child abduction and sex offenses. Pub. L. 108-21, § 401, 117 Stat. 650 (2003).

4. Ian Weinstein, *The Revenge of* Mullany v. Wilbur*:* United States v. Booker *and the Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393, 402 (2005).

Now, of course, I do not suggest that Eastwood's earlier films were precursors of the Sentencing Reform Act of 1984 nor his later films predicates for *United States v. Booker*.[5] But I am suggesting these vivid portrayals of crime and punishment by Eastwood often mirror what society is thinking and feeling about crime and criminals. As a result, there may be a rough parallel between Eastwood's filmography and the evolving attitudes of Americans toward crime and punishment.

Professor Weinstein refers to "recalibration"—a rotation of roles within the sentencing component of the criminal justice system. However, "recalibration" also marks a shift in the sentencing analysis, characterized by a more searching inquiry into the culpability of the defendant, displacing the mechanical approach of a mandatory regime.

The elevated post-*Booker* role of 18 U.S.C. § 3553 now compels the district judge to consider circumstances that may not be adequately or accurately reflected in sentencing factors such as quantity of drugs or amount of loss. The sentencing judge must now impose a sentence that reflects social and penal constructs of the Guidelines in light of the more comprehensive congressional objectives in § 3553. This permits a variation from the Guideline sentence, which, pre-*Booker*, was not allowed.

Nevertheless, the framework within which the sentencing judge performs this evaluation continues to facilitate the goals of uniformity and retributive justice reflected in the previously mandatory regime. Indeed, the judge is squarely confronted with these goals when he performs the advisory Guideline calculations as one aspect of his sentencing considerations.

However, while the post-*Booker* regime marks a recalibration of the process, it does not follow that this recalibration changes the outcome—the actual sentences imposed. A cursory review of the table below demonstrates that in the Ninth Circuit the sentences imposed before and after *Booker* are not so different.

5. United States v. Booker, 543 U.S. 220 (2005).

Ninth Circuit *Post-Booker* Sentences.[6]

Position of Sentence Relative to Guideline Range	FY 2001	FY 2002	FY 2003	FY 2004 (Pre-*Blakely*)	FY 2005-06 (*Booker*)
Within range	51.1 %	48.8 %	59.6 %	61.8 %	48.0 %
Guideline Upward Departures	0.4 %	0.7 %	1.1 %	0.8 %	0.4 %
Booker Above Range	—	—	—	—	1.2 % **
Government Sponsored Substantial Assistance Departures	10.7 %	11.8 %	10.2 %	10.6 %	10.4 %
Other Gov't Sponsored Departures	—	—	19.2 %	20.4 %	28.2 %
Guideline Downward Departures	38.7 %*	38.7 %*	9.9 %	6.5 %	3.4 %
Booker Below Range	–	—	—	—	8.4 %**

* Includes both government sponsored (for reasons other than substantial assistance) and non-sponsored guideline departures.

** Includes cases with imposed sentences outside of the guideline range mentioning only *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for a sentence outside of the guideline range and all cases with imposed sentences outside of the guideline range that do not fall into the previous category.

For example, in 2003, courts imposed 1.1 percent of sentences above the applicable Sentencing Guideline Range due to upward departures pursuant to § 5K2 of the Guidelines, and in 2004 (pre-*Blakely*[7]), courts imposed 0.8 percent of sentences above the Guideline Range. In 2005-2006, under the *Booker* advisory Guidelines regime, courts imposed only 0.4 percent of sentences above the Guideline Range. This would seem to mark a decrease in higher sentences once the Guidelines became advisory. However, the table also shows that 1.2

6. U.S. SENTENCING COMM'N, SPECIAL POST-BOOKER CODING PROJECT 10 (Feb. 14, 2006).

7 Blakely v. Washington, 542 U.S. 296 (2004).

percent of sentences were imposed above the Guideline Range based upon discretionary factors, not upon Guideline upward departures. Therefore, 1.8 percent of sentences imposed were above the Guideline Range. This represents a 1 percent differential from 2004 and a 0.7 percent differential from 2003.

The same analysis can be applied to the percentage of sentences imposed that fell below the applicable Guideline range. In 2005-2006, under the advisory regime, Guideline departures dropped to 3.4 percent, a clear drop from the 9.9 percent in 2003 and the 6.5 percent in 2004 (pre-*Blakely*). However, 8.4 percent of sentences were reduced to below the Guideline range based upon the discretionary authority granted to judges pursuant to *Booker* and implicit under 18 U.S.C. § 3553. Therefore, in total, 11.8 percent of all sentences imposed were below the Guideline range. This represents a 5.5 percent differential from 2004 and a 1.9 percent differential from 2003.

These post-*Booker* sentencing differentials, while arguably statistically marginal, are hardly marginal for the defendant who received the higher or lower sentence. Nevertheless, given that approximately 95 percent of all criminal cases do not proceed to trial, but are resolved through plea agreements, the effect of the shift to advisory Guidelines is most clearly reflected through changes in such plea agreements themselves. As a practical matter, in my experience, in the post-*Booker* sentencing regime, there are few post-plea judicial determinations of sentencing factors that would increase or decrease the offense level under the advisory Guidelines. This decrease in judicial fact-finding is accomplished through a corresponding increase in the number of plea agreement stipulations regarding offense conduct. As a result, the expectations of the government and the defendant are more clearly delineated, and the plea agreement becomes a reasonably accurate predictor of the sentence itself. I also believe, however, the post-*Booker* sentencing regime encourages defendants to take a more active role in the post-plea, pre-sentence process. Defendants can potentially benefit themselves by revealing personal characteristics relevant to § 3553 factors that would be reflected in either the pre-sentence report or the sentencing memorandum filed by the defendant. Such characteristics can and now do, on occasion, affect the ultimate disposition.

This snapshot of the post-*Booker* process, however, will quickly fade to irrelevance if Congress moves once again to harness district judges with other sentencing constraints such as more statutory mandatory minimum sentences. Perhaps, Congress will adopt a wait-and-see attitude until sufficient data is available before enacting such measures. It's even conceivable this post-*Booker* interregnum will become quasi-permanent. But as Justice Breyer unsurprisingly acknowledges, "the ball now lies in Congress' court."[8] In the interim, the district courts proceed with new found discretion to balance the need for uniform and retributive punishment with a fair consideration of individual culpability.

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8. *Booker*, 543 U.S. at 265.

Clint, of course, has the last word: "You see, in this world, there are two kinds of people, my friend, those with loaded guns and those who dig. You dig."[9]

Well, I'd better get back to my digging.

9. THE GOOD, THE BAD, AND THE UGLY (Arturo Gonzáles Producciones Cinematográficas, S.A. 1965).