

Incremental and Incendiary Rhetoric in Sentencing after *Blakely* and *Booker*

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I. INTRODUCTION

The Supreme Court's decisions in *Blakely v. Washington*¹ and *United States v. Booker*² prompted lots of talk about change in state and federal sentencing law. How much change in actual practice do these two cases portend? Some of the rhetoric about sentencing is incendiary, predicting immediate upheaval and long-term turmoil in sentencing practice across many jurisdictions. Other assessments use more incremental rhetoric, claiming that *Blakely* and *Booker* do not change the fundamentals of sentencing law and practice. It all depends on who you ask.

If you ask academics, they say the changes flowing from *Booker* and *Blakely* were huge: our favorite analogies include earthquakes, revolutions, and train wrecks.³ But academics usually see legal change in these grand terms and consistently

* Professor of Law, Wake Forest University. I am grateful to David Zlotnick, David Logan, and the other participants in the Sentencing Rhetoric symposium at the Roger Williams University School of Law in October 2005.

1. 542 U.S. 296 (2004).

2. 543 U.S. 220 (2005).

3. See generally Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004); NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY (Supp. 2005-06), available at <http://sentencing.typepad.com> (last visited Jan. 23, 2006). For a convincing argument that *Blakely* and *Booker* will have little real impact on the involvement of juries in sentencing, see generally Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693 (2005).

underestimate the power of the sprawling criminal justice system to absorb almost any new thing into something more familiar.

The sentencing rhetoric sounds different, however, when it comes from sentencing commissioners: they use incremental language when speaking about sentencing. Interestingly, the incremental rhetoric comes from commissioners regardless of the substantive policy objective they are pursuing. If commissioners want an increased role for juries, they cast that as the outcome that requires the smallest incremental move from the current situation. If they advocate an increase in discretion for judges, then they portray *that* outcome as the shortest distance away from current practices. The incremental language applies both to their descriptions of the current effects of *Booker* and *Blakely* (“those cases did not profoundly change our sentencing system”) and to their descriptions of any preferred changes to the system (“the proposal would change relatively little from the pre-*Blakely* status quo”).

This incremental rhetoric from commissions does not usefully describe the impact of *Booker* and *Blakely* on various sentencing systems. Their language of incrementalism is not meant to describe the past or present, but is designed instead to shape the future legislative reaction to this new world. Sentencing commissioners choose soothing words because most of them do not want to wake the sleeping legislative dragon. The implicit message to legislators is: “Nothing to worry about, because everything is normal, more or less like you left it.”

On the other hand, some prosecutors now use incendiary language to describe the changes in sentencing practice after *Booker* and *Blakely*. In an effort to stir the legislature to action, they portray the changes as enormous, casting current sentencing practices as an emergency.

Among judges, the use of rhetoric about sentencing is more mixed. Some judges use incremental language aimed at other judges, trying to persuade their fellow judges that the desired course is a legitimate and restrained one for judges to pursue. In other cases, judges try to limit the docket impact of the *Booker* and *Blakely* decisions and choose modest language that is best suited to narrowing the reach of a doctrine and managing a docket. Still other examples of judicial rhetoric are based on the expectation that legislators are watching closely and might react badly if they

do not like what they see.

On the other hand, not all judges use incremental language. Some are saying, loudly enough for the legislative dragon to hear, that the time for serious changes in sentencing has arrived.

All told, rhetoric about sentencing after *Booker* and *Blakely* does not serve primarily to describe current sentencing practices or to predict how the current system will adapt to change in the short run. The real value of this sentencing language is to reveal the speaker's perceived relationship with the legislature.

II. INCREMENTAL RHETORIC FROM THE COMMISSIONS

Sentencing commissions in many states and at the federal level had to respond to the Supreme Court decisions in *Booker* and *Blakely*. In every case, commissions chose language emphasizing the limited nature of any changes that the cases created or the limited costs of their preferred adjustments to bring their systems back into compliance with the Sixth Amendment. Interestingly, the same rhetorical strategy played out, regardless of the exact impact of the cases on the local sentencing rules or the precise solution that the Commission supported. The soothing rhetoric of the incremental, above all else, aimed to keep the Commission in the lead role and to prevent the legislature from re-opening the deepest questions of sentencing policy.

Minnesota was one of the states most directly affected by the *Blakely* decision because its presumptive sentencing guidelines system could not stand without either increasing the fact-finding power of juries or decreasing the binding power of the guidelines on judges.⁴ Two months after the Supreme Court decided *Blakely*, however, the Minnesota Commission stressed the limited impact of the decision in Minnesota:

[It] is very apparent that *Blakely* has changed criminal sentencing in this country and the magnitude of that change is something each individual state and the federal government will need to decipher based on their own

4. See generally Jon Wool, *Aggravated Sentencing: Blakely v. Washington: Legal Considerations for State Sentencing Systems*, POL'Y & PRAC. REV. (Vera Inst., Sept. 2004), available at http://www.vera.org/project/project1_3.asp?section_id=38project_id=26&sub_section_id=38 (last visited Jan. 23, 2006).

sentencing structure. . . .

The recent *Blakely v. Washington* decision directly impacts neither the constitutionality nor the structure of the Minnesota Sentencing Guidelines. However, the decision does affect certain sentencing procedures pertaining to aggravated departures and specific sentence enhancements that will need to be modified to meet the constitutionality issues identified under *Blakely*. Those procedures can be corrected, as demonstrated by the state of Kansas, who addressed this very issue in 2001, with *limited impact on the criminal justice system as a whole*. The impact of *Blakely* on sentencing in Minnesota, *while temporarily disruptive, is limited in scope and can be addressed within the current sentencing guidelines scheme*.⁵

The Commission's report on the impact of *Blakely* went on to emphasize that only 7.7 percent of the felony sentences in Minnesota involved aggravated sentences that potentially raised *Blakely* issues, and only 8 percent of those aggravated sentences (a total of 79 cases in 2002) were resolved at trial rather than through guilty pleas.⁶ In short, the Commission stressed the low cost of fixing the *Blakely* problem by adding jury procedures rather than by changing the basic foundations of the guideline system, converting them to more voluntary guidelines. The same calming message reappeared in the Commission's further reports to the legislature in September 2004 and January 2005.⁷

5. MINNESOTA SENTENCING GUIDELINES COMMISSION, THE IMPACT OF *BLAKELY V. WASHINGTON* ON SENTENCING IN MINNESOTA: SHORT TERM RECOMMENDATIONS 1 (Aug. 6, 2004), available at http://www.msgc.state.mn.us/Text%20Only/reports_to_the_legislature.htm (last visited Jan. 23, 2006) [hereinafter "SHORT TERM REPORT"] (emphasis added).

6. *Id.* at 5-6.

7. MINNESOTA SENTENCING GUIDELINES COMMISSION, THE IMPACT OF *BLAKELY V. WASHINGTON* ON SENTENCING IN MINNESOTA: LONG TERM RECOMMENDATIONS 3 (Sept. 30, 2004), available at http://www.msgc.state.mn.us/Text%20Only/reports_to_the_legislature.htm (last visited Jan. 23, 2006) [hereinafter "LONG TERM REPORT"] ("The number of affected cases is limited and will not constitute a crisis within the state. . . . This report contains recommendations that outline procedures to be implemented that will address the constitutional issues raised in *Blakely* and still permit sentencing to continue under the state's current sentencing

While sending reassuring signals about the limited cost of new jury proceedings, the Minnesota report ignored some potentially enormous loose ends. Two features of the Minnesota system—probation revocations and an enhancement for committing a crime while still on probation, parole, or supervised release—might trigger the *Blakely* jury requirement and enormously increase the number of affected cases. The various Minnesota reports mentioned these possibilities, but in each case the discussion appeared late in the report in a brief discussion that contained no estimates of the numbers of cases.⁸ The reports kept these larger effects out of the spotlight.

The same patterns of rhetoric also appear in states where the speaker seeks an outcome entirely different from the one that the Minnesota commission favored. For example, in Tennessee, an ad hoc Governor's Task Force pushed for more voluntary guidelines. They cast new jury proceedings as a dangerous and possibly expensive departure from known practices: "Although we recommend necessary changes, the essential components of this proposed Act will retain the policies and purposes of the 1989 Act that have served our State well."⁹

The United States Sentencing Commission has spoken cautiously, issuing relatively few reports or public statements about the operation of federal sentencing post-*Booker*. In a new series of monthly statistical reports, the Commission tracks some

scheme.”).

The Supreme Court's decision in *Blakely* did not rule determinate sentencing unconstitutional, nor did it rule aggravated departures unconstitutional. What the Court's ruling did indicate was that the state's current procedure for imposing aggravated departures and statutorily enhanced sentences is unconstitutional. The proposed modifications address those procedural issues while *preserving* the ability to impose aggravated departures in cases when appropriate and necessary to protect public safety.

MINNESOTA SENTENCING GUIDELINES COMMISSION, REPORT TO THE LEGISLATURE 1, 5-6 (Jan. 2005), available at http://www.msgc.state.mn.us/Text%20Only/reports_to_the_legislature.htm (last visited Jan. 23, 2006) [hereinafter "ANNUAL REPORT"] (emphasis added).

8. See SHORT TERM REPORT, *supra* note 5, at 9-10; LONG TERM REPORT, *supra* note 7, at 7; ANNUAL REPORT, *supra* note 7, at 5.

9. REPORT OF THE GOVERNOR'S TASK FORCE ON THE USE OF ENHANCEMENT FACTORS IN CRIMINAL SENTENCING 3 (Feb. 17, 2005), available at <http://www.tsc.state.tn.us/geninfo/PRESSREL/2004/Blakely/sentencingdocum ent%202-16-05.pdf> (last visited Jan. 23, 2006).

changes in practice without characterizing the importance or likely source of the change.¹⁰

The few public statements from commissioners have emphasized the need for careful, controlled changes to the system. A statement from Judge Ricardo Hinojosa, the Chair of the Commission, on the day after the release of the *Booker* decision put it this way:

The U.S. Sentencing Commission is in a unique position to continue to assist all three branches of government during this period of transition. [The Commission] will continue to fulfill its statutorily mandated functions such as collecting sentencing data from all federal district courts, amending the guidelines where appropriate, and conducting sentencing-related research.¹¹

Judge Hinojosa's testimony to Congress in February 2005 emphasized that "guidelines still must be calculated and considered," and that "sentencing guidelines should be given substantial weight," two propositions that emphasize continuity in the system.¹² The testimony also pointed to an incrementalist bottom line: "If Congress decides at some point to pursue legislation, we hope that it will preserve the core principles of the Sentencing Reform Act and, to the extent possible, avoid a wholesale rewriting of a system that has operated well for nearly two decades."¹³

10. U.S. SENTENCING COMMISSION, SPECIAL POST-*BOOKER* CODING PROJECT (Nov. 10, 2005), *available at* http://www.ussc.gov/Blakely/PostBooker_111005.pdf (last visited Jan. 23, 2006). The statistics appear in a format that emphasizes continuity between practices in 2003 and 2005, presenting the total percentage of "within guideline" sentences for each time period, rather than calculating the percentage increase in judicial decisions to sentence outside the guidelines.

11. News Release, U.S. Sentencing Commission, U.S. Sentencing Commission Chair Comments on High Court Ruling (Jan. 13, 2005), <http://www.ussc.gov/PRESS/rel011305.htm> (last visited Jan. 23, 2006).

12. Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission, Testimony Before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary United States House of Representatives, at 5-6 (Feb. 10, 2005), *available at* <http://www.ussc.gov/Blakely/bookertestimony.pdf> (last visited Jan. 23, 2006).

13. *Id.*

III. INCENDIARY RHETORIC FROM PROSECUTORS

The soothing rhetoric from sentencing commissions contrasts neatly with the words of alarm that prosecutors use when they describe the effects of *Blakely* and *Booker*. Prosecutors and others who want to rouse the legislative dragon argue that sentencing law needs immediate action. They cast the current situation as a major change from past practice and call for the legislature to restore the system to its happier status before the Supreme Court intervened. As with sentencing commissions, this rhetoric applies regardless of the precise substantive changes to sentencing law that the speaker seeks. The incendiary language about the present and the appeal to restore better days from the past aims for dramatic legislative action.

The best current example of such rhetoric comes from U.S. Attorney General Alberto Gonzales, who diagnosed federal sentencing problems in a speech to a victims' rights group:

[The] mandatory guidelines system is no longer in place today, and I believe its loss threatens the progress we have made in ensuring tough and fair sentences for federal offenders. . . .

More and more frequently, judges are exercising their discretion to impose sentences that depart from the carefully considered ranges developed by the U.S. Sentencing Commission. In the process, we risk losing a sentencing system that requires serious sentences for serious offenders and helps prevent disparate sentences for equally serious crimes. . . .

The federal sentencing guidelines were the result of Republicans and Democrats coming together in response to the high crime rates of the 1960s and 1970s to create an invaluable tool of justice.¹⁴

Attorney General Gonzales went on to endorse a restructuring of the guideline system, using guidelines without lids as the best

14. Alberto Gonzales, U.S. Attorney General, Prepared Remarks, Sentencing Guidelines Speech, Washington, D.C. (June 21, 2005), *available at* <http://www.usdoj.gov/ag/speeches/2005/06212005victimssofcrime.htm> (last visited Jan. 20, 2006).

way to “restore fairness and consistency in sentencing.”¹⁵ It is not surprising that prosecutors would invite legislatures to change sentencing laws, since there are powerful long-term trends that reinforce an alliance between legislators and prosecutors on criminal justice matters.¹⁶

IV. MIXED JUDICIAL RHETORIC

While prosecutors and sentencing commissioners have used fairly consistent rhetoric about their sentencing systems, judges have adopted many different rhetorical styles to describe sentencing law and practice. This mixed use of sentencing language reflects the eclectic views among judges about their relationship with the legislature on sentencing matters.

Some judges believe that an overt discussion between judges and the legislature about sentencing policy is not within the judge’s job description. Consequently, they have used language aimed only to convince other judges how to remain true to the existing law or how to manage the challenges of a crowded judicial docket. For example, when judges have discussed the availability of appellate review for defendants who did not raise jury trial rights in their appeals filed before the release of the *Blakely* or *Booker* decisions, they have asked whether the constitutional defect was serious enough to amount to “plain error” that an appellate court can hear even in the absence of an explicit reservation of the issue by the defendant. In most federal courts, the appellate judges have ruled that the error is not “plain.” The more incremental characterization of the legal error kept the

15. *Id.* (“... the sentencing court would be bound by the guidelines minimum, just as it was before the *Booker* decision. The guidelines maximum, however, would remain advisory, and the court would be bound to consider it, but not bound to adhere to it, just as it is today under *Booker*.”).

16. See William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546-56 (2002). As I have argued elsewhere, Stuntz may have overstated his argument in the context of sentencing law, as opposed to the coverage of the substantive criminal law. See generally Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004). Stuntz also fails to account for the interesting variety of political experience in various states when it comes to sentencing legislation. Stuntz’s general point about a long-term political alliance between prosecutors and legislators, however, explains nicely the general enthusiasm among prosecutors for legislative leadership in the response to *Blakely* and *Booker*.

impact on the appellate docket much smaller.¹⁷

Similarly, many discussions of “reasonableness” review in the federal courts have involved an intramural conversation among judges. In an effort to convince their fellow judges that their own version of reasonableness review is legitimate, some judges have pointed out how their preferred standards allow judges to make familiar judgments without transforming the sentencing world.¹⁸

Other judges, however, have minimized the changes that the *Blakely* and *Booker* cases brought to sentencing as a way to prevent or moderate legislative action. Several state supreme courts have interpreted their state laws in unlikely ways to avoid any impact at all from *Blakely*.¹⁹ It is easy to imagine some wishful thinking at work in these judicial rulings, a hope that the state’s sentencing system could avoid the turmoil that would happen if the legislature had to revamp an invalidated system.

More overtly, some judges have pointed out that sentencing practices are more likely to provoke legislative action if judges depart too often and too far from established sentencing patterns. Take, for instance, Judge Paul Cassell’s defense of his decision to accord great weight to the federal sentencing guidelines, even though the *Booker* opinion made the guidelines somewhat less binding:

The congressional view of how to structure that sentencing system will surely be informed by how judges respond to their newly-granted freedom under the “advisory” Guidelines system. If that discretion is exercised responsibly, Congress may be inclined to give judges greater flexibility under a new sentencing system. On the other hand, if that discretion is abused by sentences that thwart congressional objectives, Congress has ample power to respond with mandatory minimum sentences and the like.²⁰

17. See *United States v. Rodriguez-Gutierrez*, 428 F.3d 201, 204-06 (5th Cir. 2005); *United States v. Thompson*, 422 F.3d 1285, 1300-02 (11th Cir. 2005).

18. See *United States v. Mykytiuk*, 415 F.3d 606, 607-08 (7th Cir. 2005); *United States v. Crosby*, 397 F.3d 103, 114-20 (2d Cir. 2005).

19. See *State v. Gomez*, 163 S.W.3d 632, 648-62 (Tenn. 2005); *People v. Black*, 113 P.3d 534 (Cal. 2005).

20. *United States v. Wilson*, 350 F. Supp. 2d 910, 931-32 (D. Utah 2005).

Finally, there are judges who knowingly raise the rhetorical temperature, likely aware that their language will open a policy discussion with legislators.²¹ For instance, a number of judges have refused to impose guideline sentences in crack cocaine cases because those penalties are so much heavier than the penalties for comparable amounts of powder cocaine. After reviewing the original 1986 legislation that first created the 100:1 ratio between penalties for crack and powder cocaine, one judge noted the lack of any justification for this ratio in the legislative history, tracked the harmful consequences of this ratio, and declared sentences based on this weighting scheme to be “unreasonable” under Section 3553(a).²²

These last two categories—judges who adopt either incremental or incendiary rhetoric with an awareness that Congress is watching closely—are a sign of the times. In matters of criminal sentencing, as in several other subject areas, judges today must act with an awareness that the legislature returns to these questions time and again. Any judicial pronouncements (but especially the boldest pronouncements) are bound to bring forth a legislative reply. Judicial rulings cannot afford to ignore legislative responses on topics where the two branches will likely interact over and over again.

These judicial announcements could be likened to “clear statement rules,” pushing statutes in particular directions and insisting that the legislature work exceptionally hard to push the policy back in the opposite direction.²³ More generally, these

2005).

21. For examples among state courts, see generally *State v. Natale*, 878 A.2d 724 (N.J. 2005); *State v. Allen*, 615 S.E.2d 256 (N.C. 2005).

22. See *United States v. Smith*, 359 F. Supp. 2d 771, 777-82 (E.D. Wis. 2005) (Adelman, J.); see also *United States v. Perry*, 389 F. Supp. 2d 278, 300 (D.R.I. 2005) (in context of reducing guideline sentence based on unreasonableness of crack-powder distinction, court reviews federal sentencing data regarding number of sentences imposed within guideline boundaries: “Given that judges presently enjoy complete discretion regarding whether or not to follow the Guidelines, this change is arguably modest and demonstrates both judicial restraint and respect for the overarching goals of the Sentencing Reform Act, consistency and fairness across the system.”). *But see United States v. Pho*, No. 05-2455, 2006 U.S. App. LEXIS 153 (1st Cir. Jan. 5, 2006) (holding that district courts cannot reject the 100:1 ratio).

23. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (clear statement rule disfavoring readings of statutes that could alter the usual constitutional balance between state and federal governments); *Atascadero State Hospital*

rulings create necessary devices for communication among some of the major actors in sentencing policy, creating a “common law of sentencing for an age of statutes.”²⁴

V. CONCLUSION

In the world of sentencing after *Blakely* and *Booker*, rhetoric reveals a relationship. Sentencing commissioners, who cast sentencing changes as small and manageable, perceive that legislative action takes the policy initiative out of their hands. Prosecutors, who cast sentencing changes as large and threatening, calculate that their perennial allies in the legislature will refashion the sentencing laws in ways that favor them. Meanwhile, judges have yet to find a consistent rhetorical voice because they have not yet worked out a relationship with the legislature. In the long run, judicial rhetoric that shows an awareness of the legislature and a willingness to offer judicial input on sentencing policy will serve us best.

v. Scanlon, 473 U.S. 234, 237-40 (1985) (clear statement rule disfavoring congressional abrogation of Eleventh Amendment immunity).

24. Cf. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267 (1977); Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 99-100 (1999).

