

Symposium: Federal Sentencing Reform Ten Years After United States v. Booker

Introduction

RORY K. LITTLE*

Senior District Judge Charles R. Breyer began his career, upon graduation from the law school across the Bay, by clerking for U.S. District Chief Judge Oliver Carter. He was then an Assistant District Attorney in San Francisco for about six years. Subsequently, and he can tell you the story if you'd like to hear it, he got a phone call asking him to join some obscure group that was just being formed in Washington D.C., called something like the Watergate Special Prosecutors Task Force. He took that opportunity, having been advised by local mentors, "Don't go there, that's a dead end." It was quite a good experience for him.

Later Judge Breyer returned to San Francisco to enter private practice and specialize as a white-collar criminal defense attorney, ultimately becoming a named partner in the firm of Coblenz, Cahen, McCabe & Breyer. He also served as the First Assistant District Attorney to District Attorney Joe Frietas. Finally, he was appointed to the district court in 1997 by President Clinton and has served since that time.

In addition to overseeing the normal district court docket, Judge Breyer has served as a judge on the judicial conference's Multidistrict Litigation Panel. He has served on influential other advisory groups, including some international legal advisory groups. And he currently serves as Vice Chair of the U.S. Sentencing Commission. So he is particularly well positioned to talk to us about our topic today: federal sentencing reform. I have had the pleasure of introducing Judge Breyer a few other times, because for six or seven years he has taught federal criminal law here at Hastings with me. Sadly, the President stole him and put him on the Sentencing Commission, so we have lost him—temporarily at least—as an adjunct professor here.

Judge Breyer has had many prominent cases as district judge, a number of which have gone to the Supreme Court. This is either a good or

* Professor of Law, University of California Hastings College of the Law, San Francisco.

a bad thing, depending on how you count the votes, because his brother generally recuses when the case has come from Judge Breyer. Judge Breyer also did a lot of theater when he was in college; I think you will see the evidence of that. And something else that I think is true about District Judge Chuck Breyer, whether he would agree or not, is that he could have been on the Ninth Circuit any day that he wanted to. His political connections were strong enough. The politics were right. Nevertheless, he has always decided to stay on the district court because that is where the action is, that is where the law is made, and that is where the real litigation happens. I think that good judgment is reflective of his character. And I am personally very pleased that he has stayed on the district court in this district.

Without further ado, please welcome one of the most prominent U.S. District Judges in the United States, Chuck Breyer.

Keynote Address: Federal Sentencing Reform Ten Years After *United States v. Booker*

University of California
Hastings College of the Law, February 13, 2015

HON. CHARLES R. BREYER*

Thank you very much, Rory. That was a generous introduction. I think there are two things I would say about it. First, you will see evidence in the next half hour of why I did not become an actor. Second, Rory has the task this afternoon of moderating a panel of district court judges; I cannot imagine a harder task than that.

I want to address a question that has been discussed this morning and will be discussed again this afternoon. It is the question of whether the Sentencing Guidelines are relevant today, under an advisory system—the so-called post-*Booker*¹ era. It will not come as a surprise to you that I believe that they are extremely relevant and vitally important to sentencing judges today. In order to test that belief, I suggest that you look at sentencing before the guidelines were enacted.

As Professor Little remarked, I had the privilege of co-teaching Federal Criminal Law at Hastings for a number of years. It was my assignment to give the lecture on sentencing. I started my lecture with a hypothetical. Giving the students a piece of paper, I would say:

You are now a federal district court judge in 1984, and you have before you a defendant. Let me tell you about his conviction. He is an armed bank robber who took \$20,000 from the bank, and he has one prior felony conviction. So please tell me what sentence, in number of months, you would impose.

I would tell them not to look at each other's paper, that I was seeking their individual opinion as the district court judge. I would assure them that they were not going to be appealed. They would write down their sentence. Then I would add several facts, like that the defendant pled guilty. And still more, like that the defendant informed on his co-defendants and rendered substantial assistance to the prosecution. I added, too, that the defendant served as the lookout in this case; he

* Senior District Judge, Northern District of California; Vice Chair of the U.S. Sentencing Commission.

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

didn't actually go into the bank. I asked the students if these facts would change their sentence. Then I would add that the defendant is a drug addict, came from an impoverished background, and has been given no advantages in life—no decent education, no stable family life, no viable employment opportunities. And I asked whether, and if so how, that changed their sentences. Finally, I would say, "Here's another fact—he stole not out of greed. He did it only because he needed to support his family."

I then tabulated the results. And do you know what the range in sentencing was? It was everything from probation to ten years. Some of these added facts had an impact, and some did not. One student would reason, "A snitch? Someone who cooperates with the government? I'm not going to give him credit for that. You don't want a system like that." Another would argue, "A snitch? Of course he should receive a lighter sentence. How are you going to prosecute cases without someone who is willing to inform on what happened? It makes a big difference in my sentencing calculation."

One student would question why the defendant would plead guilty: "We have a system where people can go to trial, so why should they be encouraged to plead guilty?" Another would observe that guilty pleas serve the interests of the court: "You can't try every single case. There are 85,000 cases a year—how are you going to have 85,000 trials? There are only 960 federal judges."

There was great divergence of opinion among thirty Hastings law students as to the appropriate sentence and the appropriate factors to consider. There were highly individualized views as to how to sentence this individual who went into the bank with a gun, stole \$20,000, and had one prior felony conviction.

It is not just Hastings students who have these different opinions. Prior to 1984, the federal judiciary had exactly the same divergent views and practices as the Hastings students. They were all over the lot. This wide disparity caught the attention of two U.S. Senators: Strom Thurmond and Ted Kennedy. You could not have two people who differed more in their views as to political philosophies, ideologies, and criminal justice. Yet they thought, as did the rest of the Senate Judiciary Committee and, ultimately, the Senate and House, that there was something inappropriate about individuals with the same criminal past receiving very different sentences for the same criminal conduct, whether they were from Omaha, Nebraska; San Francisco, California; or Ho-Ho-Kus, New Jersey. Those different outcomes were unfair because these defendants violated the same federal law. Therefore the defendants' sentences, while they need not be identical, should be roughly the same, irrespective of the location of their courthouse, provided that their crimes share common relevant characteristics.

Thus, in 1984, Congress passed the Sentencing Reform Act,² and the Sentencing Commission was established.³ The Commission was directed to do a number of things. First, it was directed to set federal sentencing guidelines on a nationwide basis for all federal crimes. That might sound like a big task, and it was. The bipartisan Commission, made up of seven members, met for a year to address this task. And do you know what happened? Nothing! Why? Because the Commissioners constantly argued as follows:

Well, I think bank robbery is a very dangerous crime—yes indeed. But is it worse than child pornography? After all, child pornography takes young people and victimizes them. If you think that's bad, what about someone who dumps a pollutant into the San Francisco Bay and poisons people? Is it terrible? Yes, but what about tax evasion? Just think, someone doesn't pay their taxes, and word gets out that you're not going to be punished for not paying taxes, guess what's going to happen?

This went on and on. They couldn't agree as to relative lengths of sentences. They did, however, agree on one thing, and it was this: there was a historical record as to how judges, over ten years, have sentenced defendants in the federal system.

Making use of the historical record, the Commission embarked on a study of 10,000 sentences. From that study, the Commission distilled what has become known as “the heartland” for all federal criminal offenses. For example, armed bank robbers with a prior felony who take \$20,000 were sentenced, by and large, to a particular range of sentences. Then the Commission recognized that the heartland sentence is for the ordinary case. But judges not infrequently face cases that are not ordinary, that are very different from the heartland of cases. As to those cases, the Commission envisioned a system of departures. But the Commission decided it would tell judges what is and is not a legitimate departure, so that departures would be uniformly applied. The system would also be mandatory. That is, judges *had to* follow this system and *had to* impose sentences within this range, or justify a sentence outside of the heartland.⁴

Of course, several wrenches were thrown into the process. Perhaps the major wrench was mandatory minimums. In 1986, Congress came to believe that some judges were not sentencing defendants to prison for appropriate periods of time given the magnitude of the crime committed, especially in the areas of drugs and guns. Congress told judges that they

2. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

3. See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

4. See 18 U.S.C. § 3553(b) (2000). The Supreme Court later severed and excised this provision from the statute. See *Booker*, 543 U.S. at 259.

have to impose a minimum sentence in these areas.⁵ Then, of course, further problems surfaced. One problem was that the testimonies of some defendants were absolutely vital to the prosecution of the case; unless they rendered substantial assistance to the government, there would be no prosecution. But if the guidelines required judges to sentence a cooperating defendant to the mandatory minimum, goodbye cooperation. So the Department of Justice told Congress that there should be a departure from the mandatory minimums to employ one of the most effective law enforcement tools. Thus, a provision for departure on this basis was enacted; if a defendant renders substantial assistance, then judges do not have to impose the mandatory minimum,⁶ notwithstanding the fact that it will result in disparate sentences.

The second task of the Commission was to gather current statistical information on sentencing. Every year, U.S. federal courts sentence approximately 85,000 federal defendants. If you visit the office of the Sentencing Commission in Washington D.C., you will see a team of people coding—breaking down all of the sentences imposed according to all of the factors the courts considered important to their determinations. The result of this effort has been an enormously useful and detailed account of what judges today are doing and have done in the recent past in connection with sentencing. This can be analyzed on a nationwide basis, on a circuit-wide basis, and on a district-wide basis.

Now, I know that this symposium today is a symposium about what happened after *Booker* when the mandatory guideline system became an “advisory” system. It will be said by some speakers, even me, that it has had a significant impact on sentencing. But the change to an advisory system has not had as dramatic an impact as you might think. You might believe that with an advisory system, judges now give any sentence they want. Not so. The Supreme Court post-*Booker* told district judges that they may vary from the guidelines sentence but, in doing so, they must give their reasoning for the variance, and they must look at the statute, which is 18 U.S.C. § 3553(a). This statute identifies seven factors. And courts must use those factors in determining the appropriate sentence, and give their reasons for it. So courts may vary, but before they do so, they still must set the correct sentencing guideline range.⁷ Why did the Supreme Court say that? Well, I believe that it wanted judges to use the Sentencing Guidelines as an anchor. Judges then decide (absent a

5. *E.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of the U.S.C.).

6. 18 U.S.C. § 3553(e).

7. *Gall v. United States*, 552 U.S. 38, 50 (2007) (“[T]o secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. . . . [A]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.”).

mandatory minimum) whether to go down or up, and they must give their reasons for doing so.

Another important aspect of the Sentencing Reform Act was the provision of a process for amending the guidelines. Congress told the Commission to look at what judges are doing, and then decide whether it is appropriate to change the guideline range, or the factors to be considered by a judge, in light of their collective experience. Thus, in each year of its operation, the Sentencing Commission meets, sets priorities, and then offers amendments to the guidelines, which—with public notice and absent congressional action—change the guidelines. Two examples of such changes are particularly relevant to our discussion today.

The first example is drugs. The courts' experience relating to drug use and trafficking in the ongoing war on drugs demonstrated over time that the federal sentencing scheme in this area was overly harsh, not working, and needed to be reexamined to determine whether guideline sentences were accomplishing the statutory purposes of sentencing. The Commission focused on the evidence regarding recidivism in this area—do longer sentences impact recidivism? Fortunately, an earlier reduction in drug sentences involving crack cocaine had reduced the disparity between crack and powder cocaine, which provided some evidentiary insight into the question. A 2010 statutory amendment reduced this disparity from 100:1 to 18:1 and made the change potentially retroactive.⁸

The Commission recommended, as a matter of policy, that the reduction be retroactive, with the proviso that the sentencing judge retains discretion over whether to give the benefit of a lower sentence to an already-sentenced defendant. With that, judges across the country were confronted with the choice of whether to lower a particular defendant's sentence. Some judges did and some did not. Accordingly, there were two distinct groups of people: those whose sentences were reduced and those whose sentences were not. The Sentencing Commission followed both groups to see whether there was a higher rate of recidivism among those who served the shorter sentence. The result? There was no statistical difference in the rate of recidivism between these two groups.⁹ The lowering of a sentence would not necessarily increase the risk of recidivism. The two groups were equally likely, statistically, to commit another offense, or to be in violation of their supervised release. This finding called into question whether the length of sentence necessarily protects society from recidivist behavior.

8. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

9. U.S. SENTENCING COMM'N, 2014 ANNUAL REPORT A-7 (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/2014-Annual-Report.pdf>.

This study became the basis for making retroactive the “Drugs Minus Two” amendment enacted by the Sentencing Commission last year.¹⁰ As you may know, the Commission voted unanimously—Democrats and Republicans—to make the reduction retroactive at the option of the sentencing judge. In its wake, that decision brought about a serious concern over the length of all drug sentences, for if there is no real difference in the danger to the community whether someone serves sixteen years instead of fourteen years, or five years instead of three years, then you might have to rethink the role that the length of imprisonment at the high end of the guideline range plays in connection with the safety of the community. As I said, the Commission unanimously voted for retroactivity. Who did that affect? Approximately 46,000 federal inmates who were now potentially eligible for a reduction in their sentence.¹¹

This process encouraged the Commission to embark upon a multi-year study of recidivism.¹² We are right in the middle of that now. We want to know the evidentiary answers to the questions that we should have asked years ago, such as: What are the factors that contribute to recidivism? And what impact does a particular length of sentence have on those factors? That will be a very interesting study when it comes out, and the Commission has no prejudgment on those issues. Although I have been told that factors such as age play some sort of role (this is very welcoming to me at age seventy-three—perhaps I have aged out of the criminal process; fortunately I have not aged out of the judicial process). So one issue is whether you want to treat a person who is seventy-three years old differently from how you treat a person who is eighteen or twenty-five. Congress originally told the Sentencing Commission that age should be a prohibited factor to be considered in sentencing. But doesn’t that fly in the face of experience? Moreover, there may be many ways to address the fairness issue. Is it unfair to treat two people who commit the same crime—one who is twenty-five and one who is seventy-three—differently in terms of the length of their sentences? It depends on what you want to accomplish by the sentence. It is complicated. But you do have to know the facts and the evidence before you start to amend the guidelines. That is where the gathering of information by the Commission aids us in making the guidelines relevant.

10. Sentencing Guidelines for the United States Courts, 79 Fed. Reg. 44,973 (Aug. 1, 2014).

11. News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences 1 (July 18, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf. See CLEMENCY PROJECT 2014, <https://clemencyproject2014.org/> (last visited Aug. 5, 2015) (project designed to implement this change with dozens of volunteer lawyers).

12. News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Selects Policy Priorities for 2014–2015 Guidelines Amendment Cycle 2 (Aug. 18, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140814_Press_Release.pdf.

The second example of potential changes to the guidelines is in the area of fraud. I have to be somewhat circumspect because the Commission has yet to adopt proposed changes to the guidelines.¹³ A number of the proposed changes come from white-collar practitioners who argue that the measurements for white-collar offenders in terms of loss, victim impact, and other factors do not make sense in the majority of cases.

It is my personal opinion that their concerns are valid. When we received these proposals at the Commission, we did what we do in every case. We asked, “What is the evidence? What are the facts? How are judges treating white-collar offenders?” The staff looked at years of sentencing in white-collar cases. As you may know if you’ve studied the guidelines in this area, the driving force—perhaps the principal driving force—is loss. The staff found that more than fifty percent of cases sentenced under the guidelines involved a loss of \$120,000 or less, and eighty-two percent involved a loss of \$1 million or less.¹⁴ Thus, the vast majority of cases involving the fraud guidelines deal with relatively small losses.

Given that the majority of fraud cases fall into these lower categories, you might ask what judges do as to sentences in this area. The answer was interesting. It appears that the recommended guideline sentence and the imposed sentence (that is, what judges actually did) move in parallel, closely tracking each other until you reach more than \$1 million in losses. At that point, the judges vary significantly downward from the recommended guideline range. This suggested to the Commission that maybe the guidelines at those lower levels were not broken. They were consistent with the judges’ practices, until losses exceeded \$1 million. As a result, we proposed amendments to address some other concerns such as victim impact, mitigating role, and fraud on the market, but did not offer a general rewriting of the guidelines. I am sure we will hear from practitioners, from the Department of Justice, and from judges as to whether they think that these proposed changes make sense.

But my point is this: we try in our Commission deliberations not to base our decisions just on philosophy, because there might be as many different philosophies as there are Commissioners. Nor do we make decisions based solely upon our own innate sense of whether they are fair or proportional, because each Commissioner has their own sense of what is fair or proportional. We base our decisions, in the first instance, on the statistical information of what judges are doing. And that process goes back

13. Two months after this symposium, the Commission voted to adopt changes to the fraud guidelines. See News Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Adopts Economic Crime Amendments (Apr. 9, 2015), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150409_Press_Release.pdf.

14. *Quick Facts: Theft, Property Destruction, and Fraud Offenses*, U.S. SENTENCING COMM’N (Apr. 2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Theft_Property_Destruction_Fraud_FY14.pdf.

to the very methodology employed in drafting the first set of guidelines in 1984: consulting the experience of judges.

Recently, our Commission conducted a survey of all federal district court judges and asked, “Do you believe that the advisory guidelines structure that we have today best achieves the purposes of punishment?” Seventy-seven percent responded in the affirmative.¹⁵ That’s a pretty high percentage, when you think about it—frequently you can’t get judges to agree on anything, as Professor Little will be reminded of later this afternoon. So I am not here to tell you that this advisory system works in all cases or achieves absolute uniformity; in the final analysis, individual judges have to use individual judgments because they are sentencing individual defendants. That discretion cannot and should not be taken away from them. But it is not true that in an advisory system every judge simply should use that judge’s own sense of what appropriate sentences are, because when we had that system, federal judges, just like Hastings law students, gave wildly disparate sentences to similarly situated defendants. That did not promote justice. For these reasons, I think the guidelines are highly relevant today, and I would encourage all of my colleagues to treat them with seriousness. The Supreme Court has told us to do so.

Thank you very much.

15. U.S. SENTENCING COMM’N, RESULTS OF 2014 SURVEY OF UNITED STATES DISTRICT JUDGES: MODIFICATION AND REVOCATION OF PROBATION AND SUPERVISED RELEASE 30 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20150225_Judges_Survey.pdf.