

### *Symposium: Shifting Powers in the Federal Courts*

## Into the Briar Patch? Power Shifts Between Prosecution and Defense After United States v. Booker

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## INTO THE BRIAR PATCH?: POWER SHIFTS BETWEEN PROSECUTION AND DEFENSE AFTER *UNITED STATES V. BOOKER*

Margareth Etienne\*

### I. INTRODUCTION

In the popular series of *Uncle Remus* fairytales by Joel Chandler Harris,<sup>1</sup> Brer Fox is constantly trying to figure out a way to get back at his nemesis, the uppity Brer Rabbit. In *The Wonderful Tar-Baby* story, Brer Fox mixes tar and turpentine and creates a figure that he calls Tar-Baby. Brer Fox puts a large straw hat on Tar-Baby's head and places her by the side of the road while he hides in the bushes and waits for Brer Rabbit to come along. Soon enough, Brer Rabbit comes sashaying down the road, in his usual "lippity-clippity, clippity-lippity" way. He stops and greets Tar-Baby, who doesn't say a word. Brer Rabbit, not used to being ignored, tries to charm Tar-Baby into talking and grows increasingly frustrated as she remains silent. Finally, Brer Rabbit hits and kicks at Tar-Baby until he is stuck in the ball of tar. Brer Fox, who has been watching everything from his hiding place, suddenly appears and is delighted that he has finally succeeded in catching Brer Rabbit.

As a triumphant Brer Fox wonders aloud whether he should kill Brer Rabbit by barbecuing, drowning, hanging him or worse, Brer Rabbit begs and begs his captor to do whatever he wants with him so long as he does not "fling [him] in dat briar-patch."<sup>2</sup> Brer Fox, wanting Brer Rabbit to die the most miserable death apparently imaginable to rabbits, throws him right into the middle of the briar patch. Moments later, Brer Fox watches as Brer Rabbit skips away gleefully, combing the tar out of his hair with the twigs and chips from the briar patch. Brer Rabbit could be heard hollering triumphantly that he had been born and bred in the briar patch. Brer Fox had been tricked again, and the ongoing battle between Brers Fox and Rabbit is left to another day.<sup>3</sup>

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<sup>1</sup> JOEL CHANDLER HARRIS, *THE FAVORITE UNCLE REMUS* (1948).

<sup>2</sup> *Id.* at 53.

<sup>3</sup> The first part of this wonderful Southern fable begins in *The Wonderful Tar-Baby* story, and continues in *The Briar Patch* story. *Id.* at 47-50, 51-54.

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The *Tar-Baby* story is instructive in understanding the latest developments in the regulation of federal sentencing. The Supreme Court, in *United States v. Booker*,<sup>4</sup> threw federal prosecutors into the briar patch of much maligned indiscriminate sentencing. The Department of Justice can already be heard complaining about the Court's decision to make the Guidelines advisory rather than mandatory. But prosecutors narrowly escaped a situation that could have proved much more difficult for the Government when the Court decided not to engraft the Sixth Amendment jury-trial requirement onto the Sentencing Reform Act.<sup>5</sup> Although only time will reveal the true winners and losers of the *Booker* decision, there is good reason to believe that the prosecution has won this round and that criminal defendants will have to seek favorable sentencing changes elsewhere.

In this Article, I consider the Court's characterization of the constitutional problem in federal sentencing and examine its chosen remedy in assessing the potential ramifications for the Government and the defense. I argue that the solution carved out by the *Booker* Court was the best solution the Government could have hoped for following *Blakely v. Washington*<sup>6</sup> and its predecessors. First, I note that the Court did not explicitly require that the reasonable doubt standard be used at sentencing and discuss the implications of this omission. This arguably eliminates one of the principal procedural safeguards sought by the defense. For many defendants, this will permit "the sentencing factor tail" to continue "wagging the conviction dog."<sup>7</sup> Second, I contend that judges will continue applying the guidelines even though they are now advisory. Although the *Booker* decision is only a few months old, the preliminary evidence supports this prediction. Indeed, in many instances, judges will be free to give higher sentences than those previously available under the guidelines. Third, defendants who want to challenge their advisory sentences will be subject to a vague and watered-down "reasonableness" standard on appeal rather than being entitled to the prior *de novo* review by appellate courts. No doubt, government prosecutors did not seek a dismantling of the

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<sup>4</sup> 125 S. Ct. 738 (2005).

<sup>5</sup> In fact, the *Booker* Court correctly notes that, in the final analysis, its chosen remedy is remarkably similar to that urged by the Government. *See id.* at 758-59, 768.

<sup>6</sup> 124 S. Ct. 2531 (2004).

<sup>7</sup> *See infra* Part II. This interesting phrase was first adopted in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), when the Court alluded to the potential constitutional problems inherent in certain sentencing practices. A version of the phrase was again repeated by Justice Stevens, writing for the Court in *Apprendi*, who declared that "[w]hen a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000).

mandatory guideline system any more than Brer Rabbit sought to be entangled in tar. But once prosecutors found themselves in this predicament, an advisory guideline scheme was a “briar-patch” solution by the Supreme Court.

## II. THE *BOOKER* DECISION: THE SIXTH AMENDMENT PROBLEM AND ITS REMEDY

The only thing predictable about the Supreme Court’s recent holding and remedy in *United States v. Booker* has been the reaction to it: Prosecutors are disappointed.<sup>8</sup> Defendants and their lawyers are overly optimistic.<sup>9</sup> Federal judges are (mostly) jubilant.<sup>10</sup> Congress is angry on one side of the aisle and cautiously hopeful on the other.<sup>11</sup> Many see in the decision the end of federal criminal sentencing as we know it. Most of the stakeholders

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<sup>8</sup> Carl Hulse & Adam Liptak, *New Fight over Controlling Punishments Is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29 (reporting that Assistant Attorney General Christopher Wray, speaking for the Justice Department, lamented: “We are disappointed that the decision made the guidelines advisory in nature.”).

<sup>9</sup> See Mark Hamblett, *Defense Lawyers Hail Sentencing Decisions*, 231 N.Y.L.J. 1 (describing the defense as “ecstatic” about the *Booker* decision); Lorraine Woellert & Mike France, *Corporate Cases: Time to Cut a Deal?: A New Ruling Could Empower Defendants – Until Congress Rewrites Sentencing Rules*, BUS. WK., Jan. 24, 2005, at 43 (explaining that the decision “warmed the hearts of many criminal defense lawyers – and their clients”).

The optimism on the part of criminal defendants is understandable as the decision has been widely (and incorrectly in some cases) portrayed as a victory for defendants even though one of the named defendants is likely to be adversely affected by the decision. See, e.g., David Stout, *Supreme Court Rules Judges Are Not Bound by Sentencing Rules*, NAT’L ASS’N CRIM. DEF. LAW., available at <http://www.nacdl.org/public.nsf/mediasources/20050112c> (Jan. 12, 2005) (although Fanfan’s sentence is likely to be increased on remand, this article notes that “[t]he ruling was a victory for defendants, Freddie J. Booker and Ducan Fanfan, whose sentences will now be reviewed and probably adjusted downward.”).

<sup>10</sup> See Hulse & Liptak, *supra* note 8 (quoting U.S. District Judge Jack B. Weinstein as exclaiming: “I’m really elated, and I think most judges will be, too”); Myron H. Thompson, *Sentencing and Sensibility*, N.Y. TIMES, Jan. 21, 2005, at A23 (an op-ed piece by U.S. District Judge Myron Thompson comparing the pre-*Booker* federal guidelines to Draco’s laws in ancient Athens that spawned the adjective “draconian.”).

<sup>11</sup> Republican Senator Orrin G. Hatch was apparently disappointed but unsurprised by the decision, while Florida Republican Tom Feeney characterized the decision as an “egregious overreach.” Hulse & Liptak, *supra* note 8. In contrast, Democratic Senator Patrick Leahy took a wait-and-see approach: “Congress should resist the urge to rush in with quick fixes that would only generate more uncertainty and litigation and do nothing to protect public safety.” Tony Mauro, *Sentence Fragment: A Supreme Court Decision Last Week Turned Back the Clock 20 Years on Sentencing. Now Judges Are in Control and Congress Is Watching*, LEG. TIMES, Jan. 17, 2005, at 1. Massachusetts Senator Edward M. Kennedy (D), stated that he was “confident that the vast majority of federal judges will continue to apply the guidelines in ways that respect the basic goals of fairness and consistency in sentencing criminal defendants.” *United States v. Booker*, *United States v. Fanfan and the Future of the Federal Sentencing Guidelines*, Statement of Senator Edward Kennedy, Senate Judiciary Committee (Jan. 12, 2005), at <http://action.democraticmajority.com/victory2004/index.asp?test=true&ID=325> (last visited Apr. 17, 2005).

in the federal criminal system are hurriedly attempting to sort out how the new system will look and who will be the winners and losers under the new regime.

In *Booker*, the United States Supreme Court reaffirmed by a five to four majority<sup>12</sup> its previous holding that the Sixth Amendment right to a jury trial requires that any fact used to increase the sentence of a criminal defendant beyond the maximum provided for in a mandatory guidelines scheme must be admitted by the defendant or proved to a jury beyond a reasonable doubt.<sup>13</sup> The court further found that the federal sentencing guidelines were no exception to this general rule.<sup>14</sup> This application of the Sixth Amendment jury trial right is of little surprise because it is the natural culmination of a handful of cases, starting with *Jones v. United States*<sup>15</sup> and *Apprendi v. New Jersey*.<sup>16</sup> Less than a year before the decision in *Booker*, the Court reversed a defendant's sentence in *Blakely v. Washington*<sup>17</sup> because the sentence had been enhanced beyond the guidelines maximum (but not the statutory maximum) based on facts found at sentencing by the judge by a preponderance of the evidence.<sup>18</sup> Although *Blakely* concerned the Washington State Sentencing Guidelines, the Supreme Court's holding understandably cast into grave doubt the constitutionality of the Federal Sentencing Guidelines.<sup>19</sup>

Thus, the Court's finding in *Booker* that the Federal Sentencing Guidelines suffered the same constitutional problem as the Washington State Guidelines was hardly unexpected. What was more surprising than the decision to continue with the *Apprendi*-line of cases was the Court's

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<sup>12</sup> The *Booker* decision consists of two distinct majority opinions. Justice Stevens authored the first majority opinion addressing the constitutionality of the federal guidelines. He was joined by Justices Scalia, Souter, Thomas, and Ginsburg. The second majority opinion, outlining the remedy, was supported by a different majority of justices. The remedial opinion was authored by Justice Breyer and joined by Justices Rehnquist, O'Connor, Kennedy and Ginsburg.

<sup>13</sup> *United States v. Booker*, 125 S. Ct. 738, 756 (2005).

<sup>14</sup> *Id.* at 755 (explaining that "our holding in *Blakely* applies to the Sentencing Guidelines.").

<sup>15</sup> 526 U.S. 227, 230 (1999).

<sup>16</sup> 530 U.S. 466 (2000). Although most practitioners and scholars became familiar with the issue in *Apprendi* and consider it to be the inception of the line of cases leading to *Booker*, the Court properly notes that the question first arose in *Jones v. United States*, 526 U.S. 227, 230 (1999). See *Booker*, 125 S. Ct. at 752 (noting that the Sixth Amendment problem at issue in *Booker* was "first considered in *Jones* and developed in *Apprendi*").

<sup>17</sup> 124 S.Ct. 2531 (2004).

<sup>18</sup> *Id.* at 2534.

<sup>19</sup> O'Connor's dissent in *Blakely* asserted that the decision would probably apply to the Federal Sentencing Guidelines. *Id.* at 2549-50 ("The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction"). O'Connor made a similar point in *Apprendi*. See *Apprendi*, 530 U.S. at 549-554.

chosen remedy for the Sixth Amendment infirmity. Rather than require that juries henceforth be used to find all facts necessary to determine the guideline range, a different five to four majority of the Court<sup>20</sup> chose to sever and excise the portions of the Sentencing Reforming Act that made the guidelines mandatory.<sup>21</sup> The justices who favored this remedy over the jury-sentencing remedy argued that it was more faithful to the overriding goals of Congress's sentencing reform.<sup>22</sup> Ironically, the end result is an advisory guideline system that more closely resembles the indeterminate sentencing scheme that preceded the promulgation of the Federal Sentencing Guidelines.

### III. THE TAIL THAT WAGGED THE DOG BEFORE *APPRENDI* AND *BLAKELY*

Defendants appear to be the biggest losers under *Booker*. Of course, they have the most to lose. The promise of applying the Sixth Amendment jury trial requirement to sentencing enhancements was one of fairness. Recognizing in the first part of the opinion that "jury factfinding may impair the most expedient and efficient sentencing of defendants," the Court nonetheless maintains that "the interest in fairness and reliability protected by the right to a jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly."<sup>23</sup> The opportunity for greater fairness and reliability in sentencing was a significant loss for defendants in the *Booker* decision.

The principal concern that Sixth Amendment jury factfinding was expected to alleviate was that of the tail wagging the dog in sentencing. In 1986, in *McMillan v. Pennsylvania*,<sup>24</sup> the Supreme Court alluded to what it perceived to be an unacceptable (but inapplicable, in that case) constitutional problem in criminal sentencing. Deryl McMillan faced a mandatory minimum sentence of five years because after his jury trial and conviction for aggravated assault, the sentencing judge additionally found that he visibly possessed a firearm during the commission of the crime. McMillan successfully argued at sentencing that Pennsylvania's mandatory minimum statute was unconstitutional because the evidence used to enhance his sentence should be considered an element of the crime to be

<sup>20</sup> See *supra* note 12. Notably, Justice Ginsburg is seemingly the only justice in agreement with the entire decision, both on the constitutionality finding and its remedy.

<sup>21</sup> *Booker*, 125 S. Ct. at 757 (contrasting the Court's chosen remedy of rendering the Guidelines advisory with the remedy proposed by the dissenters of engrafting a Sixth Amendment "jury-trial" requirement onto the Guidelines).

<sup>22</sup> *Id.* at 767.

<sup>23</sup> *Id.* at 756.

<sup>24</sup> 477 U.S. 79 (1986).

determined by a jury beyond a reasonable doubt.<sup>25</sup> The State appealed and won before the Pennsylvania Supreme Court. In affirming the state appellate court, the United States Supreme Court recognized that states may define certain factors elements of crimes or sentencing enhancements (and prescribe burdens of proof accordingly) so long as the state did so within certain constitutional limits.<sup>26</sup> The Pennsylvania scheme was determined to operate within constitutional bounds partly because it gave “no impression of having been tailored to permit the [sentencing factor] finding to be a tail which wags the dog of the substantive offense.”<sup>27</sup>

Later in *Apprendi* and *Blakely*, the Court set aside the sentences largely because of the questions of fairness invoked by the tail wagging the dog in sentencing. In *Apprendi*, the defendant complained that the potential doubling of his sentence from ten years to twenty years based on a judicial finding at sentencing that his offense was a hate crime violated his due process rights. Judge Stevens, writing for the Court, declared that “[w]hen a judge’s finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as ‘a tail which wags the dog of the substantive offense.’”<sup>28</sup>

The *Blakely* Court relied more heavily on the Sixth Amendment than on the due process clause in its assessment of the tail-wagging problem raised by the defendant. Ralph Blakely entered into a plea agreement where he pled guilty to second-degree kidnapping rather than first-degree kidnapping. At sentencing, the court determined that he had acted with deliberate cruelty.<sup>29</sup> This sentencing factor effectively raised his sentence to that which he would have received had he been convicted of the first-degree kidnapping charge.<sup>30</sup> The Supreme Court reversed *Blakely*’s judicially-enhanced sentence, stating that reversal was needed to give full effect to the Sixth Amendment right of jury trial.<sup>31</sup> For the jury to act as a check over the judiciary, according to the Supreme Court’s reasoning, the judge must derive the power to sentence wholly from the jury’s verdict.

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<sup>25</sup> *Id.* at 82-83.

<sup>26</sup> *Id.* at 86 (“Pennsylvania chose not to redefine those offenses in order to so include it, and *Patterson* teaches that we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.”) (citing *Patterson v. New York*, 432 U.S. 197 (1977)).

<sup>27</sup> *Id.* at 88.

<sup>28</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000).

<sup>29</sup> *Blakely v. Washington*, 124 S. Ct. 2531, 2534 (2004).

<sup>30</sup> *Id.* at 2539.

<sup>31</sup> *Id.* at 2538.

Justice Scalia identified the crux of the dog-wagging problem that *Apprendi* and *Blakely* sought to correct: the absence of oversight in a system where the jury is “relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.”<sup>32</sup> We now know in hindsight that *Apprendi* and *Blakely* represented the high-water marks for the aspiration that the jury trial safeguard might work to inject some notion of fit between conviction and sentence. Any real hope of resolving this problem in federal prosecutions in the near future died with the remedy adopted in *Booker*.

#### IV. THE TAIL CONTINUES TO WAG THE DOG POST-BOOKER

Federal criminal defendants enjoyed their heyday, such as it was, between *Apprendi* and *Booker*. In the period following *Apprendi*, prosecutors regularly charged in their indictments all sentence-enhancing facts (such as drug amounts) that could lead to an increase in the statutory maximum. These facts provided notice to defendants of their full sentencing exposure and had to be found by a jury at trial or admitted as part of a guilty plea. In *Blakely*, the Court suggested that this practice ought to be applied to all facts (other than the fact of a prior conviction) that could alter the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”<sup>33</sup>

The sentencing system rejected in *Blakely* was essentially the system that prevailed in federal criminal cases. The government needed only to possess enough reliable, admissible evidence to convict the defendant of *something*; once the conviction was obtained, the government could use virtually any information it possessed to obtain the sentence it desired. After *Blakely*, the assumption that this reasoning would soon be explicitly applied to the federal system led many federal prosecutors to charge all sentencing-enhancing facts or demand their admission at guilty pleas. Thus, during the short post-*Blakely*, pre-*Booker* window, many defendants enjoyed a true reprieve from the tail-wagging-dog phenomenon.

The reprieve ends with *Booker* because for all practical purposes, that decision will continue to allow the tail to wag the dog. Once a defendant is convicted of an underlying charge, the prosecution can seek to enhance her sentence up to the statutory maximum (not just the now-advisory guideline maximum) by presenting evidence that was neither found by the jury nor admitted by the defendant in a guilty plea. This is so because the *Booker*

<sup>32</sup> *Id.* at 2539 (emphasis in original).

<sup>33</sup> *Id.* at 2537 (emphasis in original).



Court reaffirmed the judge's authority under 18 U.S.C. § 3553(a), to consider a broad range of facts in imposing a sentence.<sup>34</sup> Under 18 U.S.C. § 3553(a), these factors would likely include all of the grounds for enhancement that were possible under the once-mandatory Guidelines, including relevant and uncharged conduct—perhaps the most criticized dog-wagging basis for enhancements.<sup>35</sup>

Anyone who doubts that defendants will continue to be sentenced on the basis of conduct that was either uncharged, acquitted or unproven beyond a reasonable doubt should consider the fate of Ducan Fanfan, the defendant whose case was argued alongside Freddie Booker's before the Supreme Court.<sup>36</sup> Fanfan was charged with and convicted of conspiracy to distribute and to possess with intent to distribute at least five hundred grams of cocaine.<sup>37</sup> Based on the facts found by the jury beyond a reasonable doubt, Fanfan faced a maximum guideline sentence of seventy-eight months. At sentencing, the prosecution presented and the judge found, by a preponderance of the evidence, additional facts authorizing a sentence in the range of 188-235 months.<sup>38</sup> Specifically, the court determined that Fanfan was a leader or organizer of the criminal activity and that he was responsible for relevant conduct that would bring his drug quantities up to 2.5 kilograms of cocaine and over 261 grams of crack.<sup>39</sup> Nonetheless, relying on *Blakely's* Sixth Amendment reasoning, the judge determined that he could not impose a sentence based on facts not found by the jury.<sup>40</sup>

On appeal, the Supreme Court remanded the *Fanfan* case, authorizing the Government to seek resentencing. The clear implication for Fanfan is that the sentencing court may now consider the nature of Fanfan's role and the additional drugs not found by the jury in crafting Fanfan's new

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<sup>34</sup> 18 U.S.C. § 3553(a) (2000) (requiring the sentencing court to impose a sentence sufficient but not greater than necessary to comply with legislatively determined purposes of punishment). In addition to the characteristics of the offense and of the defendant, the sentencing court must also weigh the need for deterrence, public safety, punishment, and rehabilitative treatment. *See id.* § 3553 (a)(1)-(2).

<sup>35</sup> *See, e.g.,* Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003); Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 POL'Y ANALYSIS 1 (2002), available at <http://www.cato.org/pubs/pas/pa458.pdf>; Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697 (1996).

<sup>36</sup> *Fanfan v. United States*, No. 03-47-P-H, 2004 U.S. Dist. LEXIS 18593 (D. Me. June 28, 2004).

<sup>37</sup> *United States v. Booker*, 125 S. Ct. 738, 747 (2005).

<sup>38</sup> *Id.* at 741.

<sup>39</sup> *Id.* at 747.

<sup>40</sup> *Id.*

sentence. Fanfan will likely not evoke much sympathy to the extent that he appears to have benefited from a post-*Blakely* windfall. But whether Fanfan got a windfall depends, of course, on whether he is *actually* responsible for the additional drugs and *actually* organized or led the drug conspiracy. There can be little doubt that a more reliable answer to that question would result from a requirement at trial or sentencing that the Government prove the contested facts beyond a reasonable doubt.

Nothing in the *Booker* remedy requires that the Government's evidence in Fanfan or in any other case be put to that test. Indeed, most courts that have considered this question since *Booker* have found that defendants are not entitled to jury determinations of sentencing facts or to a reasonable doubt standard of proof.<sup>41</sup> After *Booker*, the Government can continue to do just what Justice Scalia condemned in *Blakely*: obtain a "back-door" conviction for a more serious offense on which it had only scant (or preponderance-level) evidence simply because it could obtain a conviction for a less serious offense beyond a reasonable doubt.<sup>42</sup> The Court's justification of this post-*Booker* result—that nothing in our history of sentencing proscribes judges from considering a variety of factors in sentencing<sup>43</sup>—rings hollow. The relevant question is not whether courts have traditionally been afforded the discretion to consider a wide range of sentencing factors, but whether there are some factors upon which the Government may not rely absent a more reliable and exacting burden of proof. Whatever one thinks is the appropriate sentence for Fanfan, it is certain that the process by which it will now be derived will more closely resemble the pre-Guideline indeterminate sentencing procedures where all facts were fair game for the sentencer to consider.

#### V. THE BRIAR PATCH REMEDY

Like Brer Rabbit, federal prosecutors were merely sullied a bit after the *Booker* decision. While it is true that the Court's remedy primarily reflects a choice for judicial sentencing over jury sentencing,<sup>44</sup> it also expressed some

<sup>41</sup> See, e.g., *United States v. Sharpley*, 399 F.3d 123 (2d Cir. 2005); *United States v. Nolan*, 397 F.3d 665 (8th Cir. 2005). But see *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1029 (D. Neb. 2005) (Battalion, J.) ("[T]his court finds that it will continue to require that facts that enhance a sentence are properly pled in an indictment or information, and either admitted, or submitted to a jury (or to the court if the right to a trial by jury is waived) for determination by proof beyond a reasonable doubt.").

<sup>42</sup> *Blakely v. Washington*, 124 S. Ct. 2531, 2539 (2004) (suggesting that a rejection of *Apprendi* could lead to the scenario of a conviction for murder even if the only fact found by the jury was that the defendant made "an illegal lane change while fleeing the death scene").

<sup>43</sup> *Booker*, 125 S. Ct. at 765-66.

<sup>44</sup> The Court is careful to cast this not as its own policy determination but rather as its interpretation of the legislative preference as being more consistent with congressional intent.

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distrust of what has become prosecutorial sentencing<sup>45</sup> in the federal system. A good part of the remedial opinion was devoted to criticizing the view that prosecutors were better capable of eliminating sentencing disparity.<sup>46</sup> A principle concern against engrafting the jury trial requirement onto the Sentencing Reform Act was the concern that once combined with prosecutorial selectivity in charging decisions, jury sentencing would lead to unjustified disparity and disuniformity. Notwithstanding this negative portrayal, prosecutors emerged from *Booker* as well as could be expected. Sentencings will continue in most federal courts as they have since the implementation of the Guidelines.

To the extent that the power of sentencing discretion has been restored to the federal bench, judges appear to be the biggest winners in the post-*Booker* world of indeterminate federal sentencing. Yet there is ample evidence that judges may not take advantage of their new-found discretion.<sup>47</sup> Indeed, the very preliminary data suggests that so far courts are following the guidelines in the overwhelming majority of cases. During hearings held by the United States Sentencing Commission approximately one month following the *Booker* decision, the chairman of the commission

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The Court makes clear that the merits or demerits of judge-sentencing over jury-sentencing is a policy question that it does not purport to address. Rather, the remedial majority explains its rejection of the jury factfinding remedy on grounds of legislative intent. The Court mounts several persuasive arguments as to why jury factfinding would be impractical and inconsistent with Congress' sentencing reform agenda. This may be so but the question remains as to whether, in the eyes of Congress, judicial fact-finding would still be preferable.

<sup>45</sup> Some have argued that the prosecutor's power to charge bargain provides immense power that essentially amounts to sentencing power. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 205-230 (2003) (arguing that in certain guideline sentencing systems the true sentencer becomes the prosecutor); David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196 (1995); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

<sup>46</sup> Justice Breyer's remedial opinion noted: "guidelines sentencing empowers prosecutors, even where the guidelines' authors try to fight that tendency." *Booker*, 125 S. Ct. at 782 (quoting William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2559-2560 (2004)).

<sup>47</sup> See Tom Schoenberg, *For One Wary Judge, a Toe in the Water: Paul Friedman's New World of Penalties and Policy*, LEGAL TIMES, Feb. 14, 2005, at 1 (explaining that "locally, prosecutors say they aren't seeing much deviation from the guidelines. In the Eastern District of Virginia, U.S. Attorney Paul McNulty says fewer than 10 of the sentences handed down since *Booker*/Fanfan have been outside the guidelines"); see also Adam Liptak, *Judges' New Leeway in Choosing Sentences May Result in Little Change*, N.Y. TIMES, Jan. 18, 2005, at A14 (asserting that the few states having advisory sentencing guideline systems show "remarkable conformity" between the guideline's suggested sentences and the sentences actually imposed).

noted that only nine percent of the 733 sentences imposed did not comply with the previously mandatory guidelines.<sup>48</sup>

Consistent with this data, several judges have already announced that they expect to continue with sentencing business as usual except in the rarest of circumstances.<sup>49</sup> One federal judge warned his colleagues on the bench to use their “newly granted freedom” responsibly by not deviating too much or too often from the guidelines.<sup>50</sup> Another judge explained:

These principles change the Guidelines from being mandatory to being advisory, but it is important to bear in mind that *Booker/Fanfan*, and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge. Thus, it would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum. On the contrary, the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to “consider” the Guidelines and all of the other factors listed in section 3553(a).<sup>51</sup>

This jurist’s view is consistent with the Supreme Court’s admonishment in *Booker* that judges were still required to consider the Guidelines, provide clear reasons for their sentencing decisions, and continue to cooperate with Sentencing Commission reporting requirements.<sup>52</sup>

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<sup>48</sup> See *Implications of the Booker/Fanfan Decision for the Federal Sentencing Guidelines: Hearing Before the House Subcommittee On Crime, Terrorism and Homeland Security*, 109th Cong. 7 (2005) (statement of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission). These figures should be contrasted to the pre-*Booker* sentences, in which, for example, judges in 2002 adhered to the guidelines in only sixty-five percent of cases. U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Fig. G (2002), available at <http://www.ussc.gov/ANNRPT/2002/fig-g.pdf> [hereinafter SOURCEBOOK].

<sup>49</sup> See *United States v. Barkley*, No. 04-CR-119-H, 2005 U.S. Dist. LEXIS 2060, \*13-14 (N.D. Okla. Jan. 24, 2005); *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005). *But see United States v. Ranum*, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005) (criticizing *Wilson* and arguing that “*Booker* is not an invitation to do business as usual”).

<sup>50</sup> *Wilson*, 350 F. Supp. 2d at 66 (Cassell, J.) (imposing the same 188 month sentence in a post-*Booker* robbery case that the pre-*Booker* guidelines would have mandated).

<sup>51</sup> *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (Newman, J.).

<sup>52</sup> *United States v. Booker*, 125 S. Ct. 738, 750-51 (2005).

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Second, even if judges ignored the Guidelines – which is unlikely for the reasons stated above – sentences will not return to their pre-Guideline equivalents. Twenty years of Guidelines have changed judges and have forever altered their sense of what sentences are just and appropriate.<sup>53</sup> Good judging is difficult, time-consuming work<sup>54</sup> and the Guidelines offer a systematic rational alternative that seems less arbitrary than the completely unguided discretion of the preceding indeterminate sentencing era. An indeterminate sentencing process may seem especially daunting to an entire generation of federal judges that has never before considered a defendant’s just punishment without the training wheels of a sentencing grid. The term “fear of judging” coined by Kate Stith and José Cabranes – commonly used to refer to the societal fear of judicial leniency and arbitrariness – may soon come to mean the phobia experienced by judges themselves of now having to make independent sentencing decisions.<sup>55</sup>

Finally, an advisory guideline system may not lead to changes in sentencing results because district court judges may be wary of what lawmakers might do if they perceive that new sentences are wildly inconsistent with what the guidelines would have required.<sup>56</sup> The threat of an adverse congressional response limiting judicial discretion may be the most significant prosecutorial check on sentencing.<sup>57</sup>

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<sup>53</sup> See Mauro, *supra* note 11, at 1 (noting that “[f]ederal judges – most of whom came to the bench after mandatory guidelines took effect 20 years ago – will likely flex their new muscles modestly.”).

<sup>54</sup> As one judge explained:

Sentencing will be harder now than it was a few months ago. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual.

*Ranum*, 353 F. Supp. 2d at 987 (Adelman, J.).

<sup>55</sup> See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

<sup>56</sup> As one scholar notes “I rather suspect that the federal judiciary may come to regret what has happened [in *Booker*] after Congress and the DOJ step in.” John Gibeaut, *All Sides Wary of Sentencing Ruling*, 4 A.B.A. J. E REP. 2 (Jan. 14, 2005), available at <http://www.abanet.org/journal/ereport/j14sentence.html> (last visited Apr. 17, 2005) (citing law professor and former federal prosecutor Frank O. Bowman).

<sup>57</sup> It is clear that the Department of Justice will also be actively monitoring judicial sentencing decisions. See *A View from Law Enforcement: Hearing Before the United States Sentencing Commission*, (Feb. 16, 2005) (testimony of Robert McCampbell, U.S. Attorney) at [http://www.usc.gov/hearings/02\\_15\\_05/Transcript\\_16th.pdf](http://www.usc.gov/hearings/02_15_05/Transcript_16th.pdf) (indicating that the Department of Justice “will be collecting data” on judicial sentences). In January, Deputy Attorney General James Comey sent a memo to the U.S. attorneys’ offices urging prosecutors to promote the use of the federal guidelines “in all but the extraordinary cases,” while noting which judges sentence outside the guideline. Schoenberg, *supra* note 47, at 1; see also Mauro,

Not only is there reason to believe that sentences will remain largely unchanged under the advisory guideline system, but the Court's remedy handed the prosecution a significant victory in its ruling regarding appeals. The Court ruled that sentencing appeals in federal court would be governed by a newly-announced "reasonableness standard" rather than a de novo standard of review.<sup>58</sup> What this vague new standard will mean in practice has yet to be determined.<sup>59</sup> Arguably, it provides a less meaningful opportunity for appeal than the pre-*Booker* standard of de novo review. As Justice Scalia writes, "[A] court of appeals might handle the new workload by approving virtually any sentence within the statutory range that the sentencing court imposes, so long as the district judge goes through the appropriate formalities."<sup>60</sup> This is sure to impact the defense more negatively since the vast majority of appeals are filed by defendants.<sup>61</sup>

This change in the appeal standard is a true victory for federal prosecutors. Ninety-eight percent of appeals are filed by defendants.<sup>62</sup> The Department of Justice believes these appeals are a considerable strain on Government resources. Indeed, the Department of Justice, which has long been seeking a means of reducing the number of appeals filed by defendants, instituted a broad strategy several years ago of recommending that prosecutors insert appeal waivers in all applicable plea agreements.<sup>63</sup> While its precise impact remains to be seen, this new appeal standard may

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*supra* note 11, at 1 (quoting Assistant Attorney General Christopher Wray: "The Department will continue to urge courts to apply the guidelines and to sentence offenders under the guidelines in order to vindicate the core purposes of sentencing.").

<sup>58</sup> *United States v. Booker*, 125 S. Ct., 738, 766 (2005).

<sup>59</sup> Professor Steve Chanenson, Lecture at Association of Federal Defense Attorneys (Feb. 24, 2005).

<sup>60</sup> *Booker*, 125 S. Ct. at 794. Justice Scalia adds:

At the other extreme, a court of appeals might handle the new workload by approving virtually any sentence within the statutory range that the sentencing court imposes, so long as the district judge goes through the appropriate formalities, such as expressing his consideration of and disagreement with the Guidelines sentence. What I anticipate will happen is that 'unreasonableness' review will produce a discordant symphony of different standards, varying from court to court and judge to judge. . . .

*Id.*

<sup>61</sup> SOURCEBOOK, *supra* note 48, at tbl. 57, available at <http://www.ussc.gov/ANNRPT/2002/table57.pdf>.

<sup>62</sup> SOURCEBOOK, *supra* note 48, at tpls. 57-58. Of course, only ten percent of federal cases are appealed. *Id.*

<sup>63</sup> Catharine M. Goodwin, *Summary: 1996 Committee on Criminal Law Memo on Waivers of Appeal and Advisement of the Right to Appeal*, 10 FED. SENTENCING REP. 212 (1998); John C. Keeney, *Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 FED. SENTENCING REP. 209 (1998).

go a long way in discouraging or nullifying many of the appeals that remain in the wake of the appeal waiver policy.

#### VI. CONCLUSION

The briar patch analogy has its limitations. Unlike Brer Rabbit, the Government appears to be neither celebrating nor claiming victory. But just as Brer Rabbit did not hope for an encounter with a ball of tar, the Government did not wish to have to defend the constitutionality of the mandatory guideline system.<sup>64</sup> But if the guidelines were to be declared unconstitutional, its judicially-fashioned replacement could hardly be more favorable to the Government. The threat of heavier evidentiary or procedural burdens at sentencing is practically eliminated.<sup>65</sup> Most judges will probably continue to exercise (or not exercise) their new-found discretion in a manner consistent with the Guidelines. Although some defendants may receive lighter sentences than the Guidelines might require, at least as many could receive higher sentences. And if criminal defendants do not like their post-*Booker* sentences, they have less meaningful appeal rights after *Booker* than they did before. For now it appears that this latest battle in the war over sentencing has been won by the prosecution rather than the defense. As with Brer Rabbit and Brer Fox, the saga continues.

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<sup>64</sup> In fact, no one would have even thought it possible ten years ago that the Supreme Court would find the Guidelines unconstitutional. Certainly many have challenged the constitutionality of the guidelines before *Booker* and *Fanfan*. See, e.g., *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (finding constitutional the combination of statutory and guideline provisions that permit a judge to enhance a sentence based on prior convictions); *United States v. Dunnigan*, 507 U.S. 87 (1993) (rejecting claim that increase sentence for false testimony violates Fifth Amendment confrontation rights); *Chapman v. United States*, 500 U.S. 453 (1991) (concluding that application of guidelines in calculating drug sentence did not violate due process rights); *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the Federal Sentencing Guidelines).

<sup>65</sup> Of course, nothing in *Booker* suggests a change in the Government's *Apprendi* related duties. Sentencing enhancement that increase the statutory maximum as described in *Apprendi* must still be charged in the indictment and found by a jury or admitted at the plea.