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'Tis a Gift to Be Simple: A Model Reform of the Federal Sentencing Guidelines

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When the United States Supreme Court decided *Blakely v. Washington*¹ in June 2004, the case was widely assumed to herald the death of the Federal Sentencing Guidelines and the opening of a lively debate about what should replace them. As we know, reports of the Guidelines' death proved to be greatly exaggerated. In *United States v. Booker*,² Justice Breyer pulled an advisory rabbit out of his constitutional hat, ensuring that the Guidelines would keep hop, hop, hopping along. In consequence, the federal sentencing debate in the year and a half since *Booker* has mostly been about whether the post-*Booker* guidelines are really any different from the pre-*Booker* guidelines,³ and if so, whether the differences are good or bad. Discussion about modifying the post-*Booker* structure has been largely confined to a tug-of-war between those who think the post-*Booker* advisory guidelines a modest improvement that should be preserved⁴ and those who favor legislation returning the federal system so far as possible to the pre-*Booker* status quo.⁵ To date, there has been little or no discussion among representatives of the primary institutional actors in federal sentencing—Congress, the Sentencing Commission, the judiciary, the Justice Department, and the defense bar—about significant reform of the federal sentencing regime.

The reasons for the peculiar poverty of the post-*Booker* institutional debate are beyond the scope of these introductory remarks. Whatever the reasons, several nongovernmental groups interested in federal sentencing policy have thought it right to offer their own recommendations designed to stimulate discussion of more fundamental reform of federal sentencing. This Issue of FSR is devoted to the complementary work of two such groups.

The Constitution Project Sentencing Initiative

Not long after the *Blakely* decision in 2004, the Constitution Project, an organization specializing in developing bipartisan policy solutions to complex public problems, created a Sentencing Initiative to respond to a general sense that federal sentencing was in need of careful study and, possibly, of significant reform and to the particular challenges presented by *Blakely* and, later, *Booker*. The work of the Sentencing Initiative was performed by a blue-ribbon committee chaired by former Attorney General Edwin Meese (now the Ronald Reagan Distinguished Fellow at the Heritage Foundation) and former Deputy Attorney General Philip Heymann (now James Barr Ames Professor at Harvard Law School). I served as co-reporter to the group with Dean David Yellen of Loyola University Chicago School of Law. The distinguished members of the committee were selected on the basis of sentencing expertise and ideological and institutional diversity. They included current and former prosecutors, defense lawyers, representatives of state sentencing commissions, academics, and state and federal judges.⁶ For the first half of the project, then-Judge, now-Justice Samuel Alito was an active member of the group, though he withdrew upon his nomination to the Supreme Court. At the outset, we suspected that a diverse group of sentencing and criminal justice professionals might achieve a surprising degree of consensus on the ailments of American sentencing systems and their remedies. Happily, this proved to be the case. The Constitution Project Sentencing Initiative (hereinafter "CPSI") produced a set of "Principles for the Design and Reform of Sentencing Systems"⁷

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and two reports. The first report, which applies to both federal and state sentencing system, describes and amplifies on the Principles,⁸ and the second, titled *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, applies the Principles to the particular ills of the federal system and makes concrete recommendations about what should be done in the wake of the *Booker* decision.⁹

The Constitution Project's report on federal sentencing is the first contribution to this Issue.¹⁰ It consists of three parts: a counsel of caution against any overhasty legislative response to the *Booker* decision,¹¹ a list of incremental improvements that might be made to the existing federal sentencing guidelines system,¹² and finally, an outline of a simplified federal sentencing system offered as a jumping-off point for discussion of "thoroughgoing reform of the federal sentencing system."¹³ The segment of the CPSI report outlining a simplified system should be read in its entirety because it constitutes the real introduction to the remainder of the Issue, so I will only recapitulate the highlights here.

The simplified system proposed by the CPSI builds on the general conclusions in the CPSI Principles. First, sentencing guidelines with meaningful appellate review are an important component of a desirable sentencing system. Second, the pre-*Booker* Federal Sentencing Guidelines were unduly rigid and complex and created institutional imbalances in the sentencing process.¹⁴ Third, the intersection of the preceding two conclusions with the new *Blakely/Booker* Sixth Amendment jurisprudence emphasizing the place of juries in finding sentence-influencing facts suggests "a system that is simpler and gives jury fact-finding a somewhat greater role, while at the same time balancing the need to guide judicial sentencing discretion with the need to afford judges reasonable flexibility in individual cases."¹⁵ From these general propositions, the CPSI developed a framework for a new and much simplified federal sentencing regime. The CPSI recommends the following:

1. An improved system could be built around a simplified sentencing table or grid, which would, like the existing sentencing table, be based on offense seriousness and criminal history. The number of offense seriousness levels "should be in the neighborhood of ten . . . [and] the number of criminal history categories should not exceed the number in the current guidelines, and might be reduced."¹⁶
2. "[I]n order to give jury factfinding a larger role in the determination of a defendant's sentence and to constrain judicial sentencing discretion, a defendant would be assigned to a box in the simplified sentencing grid based on" facts relating to offense seriousness found by a jury or admitted by plea, and facts relating to criminal history found by a judge.¹⁷ The facts determinative of offense level would consist of all the statutory elements of the offense of conviction plus some limited subset of additional factors, probably drawn largely from those now decided by judges in sentencing hearings (such as loss, role in the offense, and the like).
3. The CPSI notes that in a system of this kind a variety of approaches to guiding or constraining judicial discretion within the ranges of the simplified sentencing table are possible. Various approaches to guiding judicial sentencing discretion within range are described in the report. The CPSI does not endorse any of them but expresses a "consensus preference . . . for a solution that emphasizes simplicity and flexibility."¹⁸
4. In this simplified system, the constitutional rule of *Blakely* and *Booker* would preclude imposition of a sentence above the sentencing range generated by jury verdict or guilty plea. Thus, there could be no "upward departures" in the current sense. However, discretionary imposition of sentences below the range—"downward departures" in current parlance—would remain an important part of the new system. The CPSI envisions that, just as in current federal practice, downward departures could be based on assistance to the government or on a judicial determination that the case was sufficiently unusual to merit a sentence below the otherwise applicable range.¹⁹
5. Finally, the CPSI emphasizes the importance of reasoned judicial explanations of sentencing decisions.²⁰

The CPSI report on federal sentencing is an important contribution to the debate about the current status and future development of federal sentencing. Of course, neither the CPSI's critique of the Federal Sentencing Guidelines nor the configuration of the reform it proposes is entirely new. Both the basic critique and similar remedies have been suggested before by others.²¹ The importance of the Constitution Project report is that it expresses the consensus view of a strikingly diverse group

of experts both on what has been wrong with federal sentencing and on a sensible approach to fixing the problems when and if the post-*Booker* advisory regime is deemed inadequate.

That said, the Constitution Project's report only takes us so far. The mandate of that group was to describe the general outlines of a simplified and improved sentencing system, but the mandate did not extend to filling in the details. The CPSI aspired only to describe a framework on which others might build. The remainder of this Issue of FSR is devoted to the efforts of a group that set out to do just that.

The Model Sentencing Guidelines Working Group

As a consensus began to emerge in the Constitution Project about the general outlines of a desirable simplifying reform of federal sentencing, several participants in the Constitution Project and some outside observers who had been thinking on parallel lines began to discuss what a system built on the CPSI framework would look like in concrete terms. The participants in these discussions shared the view expressed by the CPSI that no immediate "*Booker-fix*" legislation should be undertaken, but their conversations nonetheless evolved into an effort to formulate some of the basic rules of a simplified system. This effort evolved in its turn into a project to write Model Sentencing Guidelines based on the CPSI framework. For ease of reference, I have categorized the contributors to this project as the "Model Sentencing Guidelines Working Group," but this title implies rather more formality than we can honestly claim. Unlike the Constitution Project Sentencing Initiative, which had a definite institutional affiliation, membership list, and organizational structure, the Working Group was ad hoc, informal, and fluid—an irregular association of busy volunteers. The group includes four editors of the *Federal Sentencing Reporter* (Professor Steven Chanenson of Villanova, Professor and Associate Dean Nora Demleitner of Hofstra, Professor Michael O'Hear of Marquette, and myself); James Felman, a partner in the Tampa law firm of Kynes, Markman & Felman, P.A., and also a member of the Constitution Project Sentencing Initiative; Amy Baron-Evans and Beverly Dyer, both of the Federal Public and Community Defenders; and Mary Price, General Counsel of Families Against Mandatory Minimums.

Authorship and Objectives of the Model Sentencing Guidelines

The Model Guidelines prepared by the Working Group are a collaborative effort in the sense that the basic principles and fundamental structures were extensively discussed and broadly agreed upon. Moreover, every piece of the whole was circulated among the other members of the group for comment and feedback before being finalized. Nonetheless, each separately titled component was individually authored and final responsibility for and decision-making authority about the content of each piece rested with the author whose name appears on it. We proceeded in this way for at least two reasons. First, trying to achieve consensus on every line of so large a project would have delayed its completion indefinitely. Second, and more fundamentally, our primary objective in composing these Model Guidelines was not to produce a complete new system, polished in every detail, but to demonstrate that a sensible, workable, intellectually coherent structure could be built around the CPSI framework.

This is not to say that in drafting the language of the Model Guidelines the Working Group's concerns were merely mechanical. On the contrary, one of the things this project highlighted for all of us is the number of substantive choices involved in reinventing a set of sentencing rules, and the degree to which choices in one area interact with choices in another. Each of us made dozens of choices to keep, modify, or discard elements or concepts from the current guidelines system, to maintain, increase, or reduce the impact of various factors on sentencing outcomes, and sometimes to add elements or concepts that we felt to be missing in current law. Not all of our choices will meet with universal approbation. Some will doubtless be rejected out of hand. We hope, however, that the vast bulk of our choices are at the least clearly stated and, where necessary, articulately defended. The true purpose of these Model Sentencing Guidelines is not to end debate but to provide concrete proposals to serve as a starting point from which a real debate can begin.

One additional observation about the Working Group's methods and objectives may be in order. In drafting these Model Guidelines, all of us relied heavily on the existing Federal Sentencing Guidelines structure. While what we produced is different in many important ways from the current Guidelines, the antecedents of our work are obvious. Several members of the group were troubled by the extent of our reliance on the existing structure and would have liked to consider even more fundamental changes. Limitations of time and resources precluded us from delving any deeper than we

did. Even if those reading this work conclude that more fundamental changes are in order, we hope that what we have done is nonetheless valuable.

Content and Design of the Model Sentencing Guidelines

What the Working Group has produced is not a complete new federal sentencing system, but a selected set of Model Sentencing Guidelines that cover most of the major issues that would have to be addressed in writing real sentencing guidelines based on the simplified CPSI framework. This Issue contains a simplified sentencing table and a revised approach to criminal history; procedural rules governing the determination of facts that determine sentencing range and facts relevant to setting sentences within range; simplified guidelines for economic crimes, environmental crimes, firearms offenses, immigration offenses, perjury, and obstruction of justice; guidelines for sentencing factors applicable to all offense types, including rules governing adjustments for guilty pleas; and rules governing departures. Each of these segments contains model guidelines language and advisory notes, as well as drafter's commentary explaining the issues faced and choices made in the course of composing the rule. Because each contribution is explained by its author, I will not discuss the substance of particular Model Guidelines in any detail here. Several general observations may, however, be useful.

The first task in creating these Model Guidelines was devising a working model for a simplified sentencing table based on offense seriousness and criminal history. Drafting the model table involved a series of choices. First, how many offense levels should be on the vertical axis? Second, how many criminal history categories should be on the horizontal axis? Third, should the ranges be contiguous or overlapping? Fourth, should the ranges be uniform in width or vary somewhat depending on the seriousness of the offense or extensiveness of the criminal history? Fifth, what numbers should be placed in each box? Our answers to these questions are set out and explained in two segments, one on simplification of the offense seriousness scale²² and another on revising criminal history.²³

The next task was to write rules governing the determination of facts that generate sentencing ranges on the sentencing table. These rules are contained in Model Guidelines §§1.2–1.4 and address procedures and burdens of proof applicable to establishing range-determinative facts by plea, jury verdict, or (when consented to by the defendant) bench trial.²⁴ Writing these rules was at times technically challenging, but the constitutional parameters were fairly clear.

Somewhat more difficult were the rules set out in Model Guidelines §§1.5–1.8²⁵ governing post-conviction judicial determinations of facts relevant to assigning a defendant's sentence within the applicable sentencing range. How one thinks of post-conviction judicial fact-finding depends in some measure on the mechanisms one adopts to guide judicial sentencing discretion within range. For example, if one were to create a regime in which post-conviction judicial findings of fact narrowly constrained judges' choices about where to sentence a defendant within the jury- or plea-created range, one might insist on a higher burden of proof and more extensive procedural protections than if post-conviction findings of fact played a purely advisory or explanatory role in setting sentences within range. Even though most of the factors identified in these Model Guidelines as relevant to assignment of sentence within range have only an advisory effect, the Model Guidelines insist on a burden of proof and procedural protections for post-conviction findings of fact equivalent to, and in some instances more stringent than, the existing Federal Sentencing Guidelines. The view manifested here is that no fact should have even advisory weight unless, after an adversarial process, a judge determines it to be a fact. In addition, the Model Guidelines wrestle with the perennially challenging questions of what conduct should count for sentencing purposes ("relevant conduct")²⁶ and whether acquitted conduct should be considered by a sentencing judge.²⁷

Drafting the Offense Guidelines

These Model Guidelines contain provisions for six types of federal crime—economic crimes,²⁸ environmental crimes,²⁹ firearms offenses,³⁰ immigration,³¹ perjury,³² and obstruction of justice.³³ Each crime type presented unique drafting challenges, but the overarching issue was always the question of which sentencing factors to pick as determinative of sentencing range, which to identify as important within range, and which to discard altogether (at least as factors meriting particular mention in the text of guidelines). Once factors were identified and sorted into these categories, the second big issue was what effect to give factors relevant to within-range sentencing. That is, should post-conviction judicial findings have mandatory, advisory, or only explanatory effect on the assignment of a

within-range sentence? Each drafter approached these issues somewhat differently, but the general problem deserves some comment.

All of us were striving for simplicity. But simplicity had to be balanced against other values. For example, the fundamental principle underlying *Booker* is that jury findings of fact should have a stronger relationship to sentencing outcomes than had previously been the case in many jurisdictions. If one takes that principle seriously, then jury findings of fact must place meaningful constraints on the sentencing discretion of the judge, and the facts the jury is asked to find must have some reasonable correlation to offense seriousness. In practice, these theoretical imperatives mean that the jury must be given a reasonable number of facts to find if their findings are to break the population of all offenders for each crime type into a meaningful number of subgroups. Therefore, even at the jury level, fidelity to *Booker* requires some irreducible quantum of complexity.

Second, if a revised system is to achieve the CPSI's objective of promoting flexibility by widening the ranges within which judicial discretion can operate, the question of whether, and if so how, to constrain or guide judicial discretion within those ranges arises. Unless one is prepared to say that the model ranges will operate exactly as the current guidelines ranges do, with judges free to sentence anywhere in the range with no constraint, guidance, or explanation, then one must have a set of rules about how the judges sentence within range. There was a diversity of views in the Working Group about the optimum degree of guidance that ought to be provided to judges. However, all ultimately agreed that some rules guiding judicial discretion within range were required. The spectrum of possible rules on this subject is very wide, running from schemes that are very complex and very binding³⁴ to schemes that require nothing more than that judges should explain their reasons.

Guiding Judicial Discretion within Range

The primary mechanism for guiding judicial discretion adopted in these Model Guidelines is identifying commonly occurring aggravating and mitigating factors and instructing the judge to consider them when setting a sentence within the applicable range. This approach, in combination with the requirement of Model Sentencing Guidelines §1.8 that the sentencing court provide a meaningful statement of reasons, including "findings of fact as to all facts that the court considered relevant and material to determining the defendant's sentence within the applicable range," is designed to ensure that relevant factors be considered in the cases where they are present and that courts generate useful explanations of how the interplay of relevant factors produced particular outcomes. It should be emphasized, of course, that by identifying certain aggravating and mitigating factors a judge should consider, the Model Guidelines do not exclude from consideration factors not selected for special mention.

Several Model Guidelines propose, at least as an alternative, a different and somewhat more binding mechanism for guiding judicial discretion. These Model Guidelines identify certain factors that, if found by the judge post-conviction, would generate either a requirement or a presumption that the defendant be sentenced above the midpoint of the applicable range. For example, pursuant to the proposed economic crime guideline, Model Sentencing Guidelines §2B1(c), if the court finds that "the offense substantially endangered the solvency or financial security of ten or more persons," then the court "[shall/should ordinarily] impose a sentence above the midpoint of the applicable sentencing range." If the word "shall" were chosen, then a finding of the fact at issue would effectively raise the bottom of the range to its midpoint, constraining the choice of within-range sentences to the top half of the original range. If the phrase "should ordinarily" were chosen, the effect would be to create a presumption, though not a requirement, that a sentence above the midpoint of the range should be imposed.

This proposed mechanism for constraining judicial discretion within range was the focus of one of the most pronounced disagreements among the members of the Working Group. All of the members of the group affiliated with the defense bar opposed employing it, and only two of us actually wrote this mechanism into the guidelines we drafted, even as an option.

The primary advantages of a midpoint mechanism are that it permits giving either mandatory or presumptive effect to factors that are important to determining offense seriousness but (1) are not of sufficient magnitude to justify an increase or decrease of one full offense level in light of the expanded size of the proposed model ranges or (2) are not well suited to determination by juries. An example of the first type is the enhancement for less serious instances of causing or risking injury enumerated in Model Guideline §3.3(b).³⁵ An example of the second type is the enhancement for obstructions of justice that occur during the course of the investigation, prosecution, or sentencing of a case, Model Sentencing Guidelines §3.5.³⁶ The "sophisticated means" enhancement in the

economic crime guideline³⁷ falls into both categories—it is important to offense seriousness, but not enough to justify a full one-offense-level increase, and it involves comparative judgments about different means of committing fraud that are best made by a judge, rather than a jury.

Those opposed to employing the midpoint mechanism make several arguments. First, they note that the constitutionality of the device depends on the continuing viability of *Harris v. United States*,³⁸ in which the Supreme Court upheld the use of judicial fact-finding, by a preponderance of the evidence, of facts that raise or trigger a mandatory minimum sentence. They contend that *Harris* is in doubt in the wake of the *Apprendi v. New Jersey*,³⁹ *Blakely*, and *Booker* line of cases⁴⁰ and that a new sentencing system should be free of constitutionally dubious provisions. They believe that the device is in doubt in either its mandatory (“shall impose”) or presumptive (“should ordinarily impose”) form, emphasizing the holding of the *Booker* merits majority that the availability of departure under the Guidelines did not avoid their constitutional infirmity.⁴¹

Second, those who dislike the midpoint mechanism disapprove of it on policy grounds. They are concerned that it would give undue influence to a small subset of sentencing factors, particularly factors that may tend to disproportionately increase sentence severity, and in general prefer a regime in which the many factors that may properly influence a sentence within range should be carefully weighed against one another on a case-by-case basis without giving even presumptive effect to any of them.

For myself, I do not find the constitutional argument particularly compelling, at least as to the presumptive form of the device. Although I may be proven entirely wrong by the Supreme Court’s upcoming decision in *Cunningham v. California*,⁴² it seems unlikely that the Court, whatever it does about *Harris*, will hold that post-conviction judicial findings of fact cannot create even a presumption that a sentence should be imposed above a particular point. That said, I find the policy arguments against the midpoint device forceful, if not conclusive. Because this is a model for discussion purposes, and not a law, the midpoint device remains in this Issue as an option.

Other Features of Model Guidelines

In addition to the sections already discussed, Sections 3.1 through 3.6 of the Model Guidelines contain provisions for sentencing factors applicable to all offense types⁴³ analogous to Chapter Three of the current Guidelines. The Working Group concurred with the CPSI on the necessity of giving sentence discounts for guilty pleas and cooperation with the government. These provisions are found in Model Sentencing Guidelines §§ 3.7 and 3.8. Finally, the Working Group was unanimous in its view that a well-designed and appropriately flexible departure mechanism is key to the success of this proposal. Section 5.1 of the Model Guidelines addresses departures.⁴⁴

Severity

The Constitution Project Sentencing Initiative took no position in either of its reports on the severity of sentences in the current federal sentencing regime. It recommended adoption of a simplified guidelines system irrespective of any consideration of sentencing outcomes. The position of the Model Guidelines Working Group, at least as expressed in its work product, is not so rigorously agnostic. On the one hand, the Working Group favors a simpler sentencing system irrespective of severity levels, and it was at least suggested at the outset that we write rules leaving the actual sentencing numbers to be filled in by others. We found, however, that such a purely theoretical exercise was impossible, at least for us. Only by using numbers representative of real outcomes could we understand the effects and interactions of the rules we were composing. In consequence, the Model Guidelines presented here can be applied to real cases, and the sentencing ranges they would prescribe can be ascertained.

The result is that, although the Model Guidelines would not produce across-the-board sentence decreases for all defendants and, if enacted, would maintain severity levels broadly comparable to the current system, a number of the model provisions would ameliorate to some extent the sentences of some classes of federal defendants. The views of the Working Group on individual provisions often differed, but it is fair to say that virtually every member of the group felt that federal sentences for at least some classes of crime are now unnecessarily severe. This more skeptical view of current federal sentencing levels may stem in part from the fact that participants in the Working Group are not as institutionally diverse as the members of the CPSI.⁴⁵ Whatever one’s views on sentencing severity, however, it is critical to remember that the primary purpose of drafting these Model Sentencing Guidelines has not been to advocate particular outcomes in particular cases but to demonstrate the feasibility of the structural model sketched by the CPSI.

One other point on severity deserves mention. Because the sentencing ranges in the Model Guidelines will generally be wider than the ranges in the current Guidelines, the question of whether a range generated by the Model Guidelines is more or less severe than the currently applicable range is more complicated than first appears. Consider three cases:

CASE ONE: The current Guidelines generate a sentencing range of 30–37 months, while the Model Guidelines would produce a range of 12–24 months for the same offense.

CASE TWO: The current Guidelines generate a sentencing range of 30–37 months, while the Model Guidelines would produce a range of 24–60 months for the same offense.

CASE THREE: The current Guidelines generate a sentencing range of 108–135 months, while the Model Guidelines would produce a range of 132–180 months for the same offense.

In Case One, the Model Guidelines unambiguously produce a more lenient result since both the low end and the high end of the model range are lower than the low end of the current Guidelines range. In Case Three, although there is some overlap between the current and model ranges, the model range would have to be classed as more severe because its low end is higher than the low end of the current Guidelines range and its high end is also higher than the high end of the current Guidelines range. Thus a judge applying the Model Guidelines to Case Three would be barred, absent departure, from imposing sentences as low as the bottom of the current Guideline and could impose sentences higher than the top of the current Guideline.

Characterizing Case Two is a bit more difficult. The low end of the model range is lower than the low end of the current Guidelines range, thus permitting a lower within-range sentence than is now the case, but on the other hand, the high end of the model range is higher than the high end of the current Guidelines range, thus permitting a higher within-range sentence than is now the case. Some might see the model range in Case Two as more lenient than the current Guidelines because the low end of the model is lower than the low end of the current Guidelines. However, this interpretation assumes that judicial sentencing patterns relative to the range will remain comparable to present norms, with most sentences tending toward the low end. That does not necessarily follow. Indeed, if ranges are correctly calibrated, the new normal should be average sentences clustering in the middle of the available range. Thus, considered carefully, Case Two is an example of outcome neutrality between the current and model systems.

The Way Forward

The participants in the Constitution Project Sentencing Initiative and the Model Sentencing Guidelines Working Group are a diverse bunch with strong views on many things. While there is much about which they would doubtless disagree, they are united in the conviction that the federal sentencing system that has evolved since the Sentencing Reform Act of 1984 falls short of the ideal and in their vision of the direction in which efforts to improve it should move. The Constitution Project has offered a compelling critique of the federal sentencing regime and the outline of a better, simpler federal system. The Working Group has taken the next step by creating a working guidelines model based on the Constitution Project blueprint. What happens now rests in the hands of others. The institutional actors concerned with federal sentencing may decide that the Federal Sentencing Guidelines in their post-*Booker* advisory form are better than they were and good enough to be getting on with. But if, as I personally hope will prove to be the case, there emerges a consensus that we can and should try to do better still, then the CPSI recommendations and the Model Sentencing Guidelines in this Issue can provide a concrete starting point for debate about real reform.

Notes

- ¹ 542 U.S. 296 (2004).
- ² 543 U.S. 220 (2005).
- ³ For data on and analysis of the state of post-*Booker* federal sentencing, see U.S. Sentencing Comm'n, Final Report on the Impact of United States v. Booker on Federal Sentencing, at https://www.ussc.gov/booker_report/Booker_Report.pdf; and Frank O. Bowman, III, *The Year of Jubilee ... or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after Booker*, 43 HOUSTON L. REV. 279 (2006).
- ⁴ See, e.g., *Oversight Hearing on United States v. Booker: One Year Later—Chaos or Status Quo?*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. (March 16, 2006) (testimony of James E. Felman), at <http://judiciary.house.gov/media/pdfs/felman031606.pdf>.

- ⁵ The Department of Justice is the most vocal advocate of legislation returning the Guidelines to their pre-Booker mandatory status. See, *id.* (testimony of William M. Mercer, U.S. Attorney for the District of Montana & Principal Assoc. Dep. Atty. General) 30-34, at <http://judiciary.house.gov/media/pdfs/mercer031606.pdf>; Alberto Gonzales, U.S. Attorney General, Sentencing Guidelines Speech (June 21, 2005) at <http://www.usdoj.gov/ag/speeches/2005/06212005victimssofcrime.htm>; Statement of Christopher Wray, Assistant Attorney General, The Future of Sentencing, Testimony Before the U.S. Sentencing Comm'n (Nov. 17, 2004), at http://www.ussc.gov/hearings/11_16_04/Wray-testimony.pdf.
- ⁶ The members of the Constitution Project Sentencing Initiative, less Justice Alito, are listed in this issue at 18 FED. SENT. REP. 310 (2006). A list of the members with brief summaries of their professional backgrounds can be found at <http://www.constitutionproject.org/sentencing/members.cfm?categoryId=7>.
- ⁷ Constitution Project Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems*, available at http://www.constitutionproject.org/pdf/sentencing_principles2.pdf.
- ⁸ Constitution Project Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems: A Background Report*, available at http://www.constitutionproject.org/pdf/Sentencing_Principles_Background_Report.pdf (hereinafter "CPSI, Principles Report"). See also, *Excerpts from Principles for Sentencing Systems: A Background Report*, 18 FED. SENT. REP. 207 (2006).
- ⁹ Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 FED. SENT. REP. 310 (2006), also available at <http://www.constitutionproject.org/pdf/SentencingRecs-Final.pdf> (hereinafter "CPSI, Federal Recommendations").
- ¹⁰ *Id.*
- ¹¹ *Id.* at 311-312.
- ¹² *Id.* at 312-313. Particularly notable among these proposals are suggested amendments to the Federal Rules of Criminal Procedure enhancing procedural protections for defendants in the fact-finding phase of sentencing, *id.* and a proposal to provide victim access to relevant portion of the Presentence Investigation Report, *id.* at 313.
- ¹³ *Id.* at 314-317.
- ¹⁴ For an explanation of how the structure of the Federal Sentencing Guidelines produces institutional imbalances at both the rule-making and sentence imposition phases of the federal sentencing process, see CPSI, *Principles Report*, *supra* note 8, at 21-22, 34-38.
- ¹⁵ CPSI, *Federal Recommendations*, *supra* note 9, at 314.
- ¹⁶ *Id.*
- ¹⁷ *Id.* at 314-315.
- ¹⁸ *Id.* at 316.
- ¹⁹ *Id.* at 316-317.
- ²⁰ *Id.* at 317.
- ²¹ See R. Barry Ruback & Johnathan Wroblewski, *The Federal Sentencing Guidelines: Psychological & Policy Reasons for Simplification*, 7 PSYCHOL., PUB. POL'Y, & LAW 739 (2001); James Felman, *How Should the Congress Respond If the Supreme Court Strikes Down the Sentencing Guidelines?*, 17 FED. SENT. REP. 97 (Dec. 2004); Letter from Practitioners' Advisory Group to United States Sentencing Commission (Nov. 4, 2004), available at <http://www.usscpag.com/index.asp>; American Bar Association, Recommendation 301, Midyear 2005 (Criminal Justice Section), 17 FED. SENT. REP. 335 (June 2005); Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing after Booker*, 2005 U. CHI. LEGAL F. 149 (2005).
- ²² Frank O. Bowman, III, *A Simplified Sentencing Grid, Model Sentencing Guidelines §1.1*, 18 FED. SENT. REP. 320 (2006).
- ²³ Beverly Dyer, *Revising Criminal History, Model Sentencing Guidelines §4.1*, 18 FED. SENT. REP. 373 (2006).
- ²⁴ Frank O. Bowman, III, *Determining the Sentencing Range and Sentence within Range: Model Sentencing Guidelines, §§1.2-1.8*, 18 FED. SENT. REP. 323 (2006).
- ²⁵ *Id.*
- ²⁶ *Id.* at 325 (Model Sentencing Guidelines §1.6).
- ²⁷ *Id.* (Model Sentencing Guidelines §1.7).
- ²⁸ Frank O. Bowman, III, *Economic Crimes: Model Sentencing Guidelines §2B1*, 18 FED. SENT. REP. 330 (2006).
- ²⁹ Michael M. O'Hear, *Criminal Violations of Environmental Laws: Model Sentencing Guidelines §2E1*, 18 FED. SENT. REP. 341 (2006).
- ³⁰ Mary Price, *Firearms Offenses: Model Sentencing Guidelines §2F1*, 18 FED. SENT. REP. 346 (2006).
- ³¹ Nora Demleitner, *Offenses Involving Immigration, Naturalization, and Passports: Model Sentencing Guidelines §§ 2I1, 2I2, 2I3, and 2I4*, 18 FED. SENT. REP. 351 (2006).
- ³² Steven L. Chanenson, *Perjury or Subornation of Perjury; Bribery of Witnesses: Model Sentencing Guidelines §2J1*, 18 FED. SENT. REP. 359 (2006).
- ³³ Steven L. Chanenson, *Obstruction of Justice: Model Sentencing Guidelines §2J2*, 18 FED. SENT. REP. 361 (2006).
- ³⁴ See, e.g., Bowman, *Beyond Band-Aids*, *supra* note 21, at 205-213 (proposing a complex set of rules for constraining judicial sentencing discretion within range).
- ³⁵ 18 FED. SENT. REP. 366-367 (2006).
- ³⁶ 18 FED. SENT. REP. 368 (2006).
- ³⁷ See Model Sentencing Guidelines §2B1(c)(2), 18 FED. SENT. REP. 330 (2006).
- ³⁸ *Harris v. United States*, 536 U.S. 545 (2002).
- ³⁹ 530 U.S. 466 (2000).
- ⁴⁰ See Constitution Project's Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 8-9 (July 11, 2006) ("*Harris* seems contrary to the rationale of the *Apprendi-Blakely-Booker* line

of jury trial decisions and may not survive a direct challenge.”); Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule Harris*, 18 FED. SENT. REP. 4 (April 2006) (arguing that the Court may well overrule *Harris* whether in the context of evolving case law or in response to proposals for mandatory or presumptive minimum guidelines); Felman Testimony, *supra* note 4 (arguing that the decisions in *Blakely* and *Booker* may presage reversal of *Harris v. United States*).

⁴¹ *Booker*, 543 U.S. at 234

⁴² Case No. 05-6551 (testing the constitutionality of the California sentencing regime in light of *Blakely v. Washington* and *United States v. Booker*).

⁴³ Frank O. Bowman, III, *Sentencing Factors Applicable to All Offense Types: Model Sentencing Guidelines §§3.1-3.6*, 18 FED. SENT. REP. 364 (2006).

⁴⁴ Frank O. Bowman, III, *Departures: Model Sentencing Guidelines §5.1*, 18 FED. SENT. REP. 380 (2006).

⁴⁵ Three of the participants—Beverly Dyer, Amy Baron-Evans, and James Felman—are active members of the federal defense bar, and a fourth, Mary Price, works for the sentencing reform organization, Families Against Mandatory Minimums. The rest of us—Steve Chanenson, Michael O’Hear, Nora Demleitner, and myself—are law professors and members of the *Federal Sentencing Reporter* editorial board. Although Professor Chanenson is a former federal prosecutor and I was a federal and state prosecutor for thirteen years, no active prosecutor participated in drafting the Model Guidelines.