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Syposium on Sentencing Rhetoric: Competing Narratives in the Post-Booker Era

David M. Zlotnick
Roger Williams University School of Law

Symposium

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David M. Zlotnick*

FOREWORD

On January 12, 2005, the Supreme Court held that the United States Sentencing Guidelines were unconstitutional as mandatory rules, unsettling a sentencing regime that had been in place since 1987.[1] While the first order of business for the criminal justice system has been to implement the Court-created advisory Guidelines regime, almost immediately the debate began

* Associate Professor of Law, Roger Williams University School of Law, J.D. Harvard Law School, 1986. Many are due thanks for making this volume and the symposium happen. First and foremost, however, is Dean David Logan who asked me to undertake the project, and as importantly, provided the funding. Chelsie Horne, C.M.P. ran a flawless event and the editors of the law review handled the authors with care. I also deeply appreciate the willingness of my sentencing comrades in academia, the bench, government, private practice, and the public interest community for taking time from their busy lives to participate in this event. With regard to my substantive contributions to the volume and the symposium panels, the dedicated research and editing efforts of Christine List are much appreciated.

1. United States v. Booker, 125 S. Ct. 738, 756 (2005).

over whether and how to replace the awkward and ill-defined sentencing process created by *Booker*'s remedial majority opinion.[2] Given the import of the decision, there have already been numerous conferences about *Booker* and its aftermath. Rather than repeat these efforts, this symposium attempted to use the lens of rhetorical analysis and narrative scholarship to offer a different perspective on the future of sentencing policy in the post-*Booker* era.

Before commenting on the symposium and the articles within, a brief introduction to the concept of sentencing rhetoric seems appropriate. I see sentencing rhetoric as a broad umbrella for the discourse within the criminal justice system and the legislative process about how punishment is determined and imposed for criminal offenses. In the courtroom, sentencing rhetoric encompasses the competing narratives of defendants, defense lawyers, prosecutors, victims, and probation officers, as well as the comments of the judge when pronouncing sentence. At the macro-level, these individual stories are spun and aggregated with the explicit intent of influencing policy decisions, as well as refracted by federalism issues and by the power struggle between the political parties and among the judiciary, executive and legislative branches.

Before *Booker* there was little expectation of any major shift in the dominant sentencing paradigm and hence sentencing rhetoric had grown formulaic and stifled at all levels of discourse. Sentencings in the federal system had become mind-numbing exercises in the arcanity of the Guidelines in which the defendant, his crime, and any obvious connection to the purposes of criminal sanctions had long disappeared. Legislative debate was comprised of not much more than a rear-guard action against continued conservative initiatives to eliminate the last vestiges of judicial discretion. However, with mandatory guidelines now eliminated as an option, all interested parties recognize the post-*Booker* world as a moment of both significant opportunity and substantial risks.

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2. I say awkward and ill-defined because, under *Booker*, a district court judge must still compute the Guidelines range and then superimpose the additional consideration of § 3553(a) on to their sentencing decision, yet without clear instructions from the Court about how to weigh the Guidelines against the statutory factors (other than the overarching standard of "reasonableness." *Booker*, 125 S. Ct. at 767.

In response, politicians and prosecutors, courts and commentators, attorneys and activists have advanced with renewed vigor, a wealth of conflicting narratives, some intended to influence individual sentences, and others crafted to shape the future of sentencing policy.

For example, although in *Booker* the Supreme Court used the formalism of constitutional discourse to invalidate the Sentencing Guidelines, suspicious legislators saw the culmination of a long-simmering rebellion by the judiciary against congressional limits on sentencing discretion.[3] Thus, legislators have amplified their longstanding rhetoric that judges are the sole obstacle to a uniform and appropriately punitive sentencing regime.[4] Federal prosecutors have chimed in with their theme that *Booker* has reduced the leverage necessary to induce cooperation from defendants and thereby endangered their ability to prosecute violent and secretive criminal organizations.[5]

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3. Rep. Thomas Feeney (R-FL) stated the decision was an "egregious overreach into Congress's constitutional power . . . that place[ed] extraordinary power to sentence a person solely in the hands of a single federal judge - who is accountable to no one [and therefore] flies in the face of the clear will of Congress." Press Release, United States House of Representatives, Feeney Comments on Supreme Court Sentencing Ruling. (Jan. 12, 2005) (available at http://www.house.gov/apps/list/press/fl24_feeney/SupremeCourtOpinion.html); *See also* Noelle Tsiqounis Valentine, *An Exploration of the Feeney Amendment: The Legislation that Prompted the Supreme Court to Undo Twenty Years of Sentencing Reform*, 55 SYRACUSE L. REV. 619, 621 (2005) (discussing the Feeney Amendment's substantial limits on judicial discretion and its influence on the Court's decision in *Booker*).

4. "Mandatory minimum penalties are effective for ensuring consistency in sentencing. Since the Supreme Court's decision in *United States v. Booker*, judges now have virtually unlimited discretion to ignore the Federal sentencing guidelines and impose whatever sentence they like, all to the detriment of public safety and fairness and sentencing through consistent and clear punishment schemes. Judges are now completely unaccountable." 151 CONG. REC. H10090-02, H10100 (Nov. 9, 2005) (statement of Rep. James Sensenbrenner). *See also Federal Sentencing After* Booker, *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 14 (Feb. 10, 2005) (written testimony of Christopher A. Wray, Assistant Attorney General) (describing sentences administered below the applicable guideline range based on factors previously prohibited from consideration).

5. *See, e.g., id.* at 16 ("This will have grave effects on the Department's ability to prosecute a wide variety of crimes . . . such as drug trafficking, gangs, corporate fraud and terrorism offenses."); Bloomberg, *U.S. Sentencing Guidelines Made Advisory by Court*, THE NOVEMBER COALITION (Jan. 12,

At the opposite end, defense attorneys are using the space created by *Booker* to resuscitate traditional sentencing allocution, calling with renewed vigor for compassion for individual defendants and telling stories of addictions and broken childhoods, and of remorse and rehabilitation.[6] Academic discourse constitutes yet another layer, which typically has invoked *Booker* to widen the lens, arguing that the Court-created turmoil creates momentum for a fundamental reconsideration of sentencing policy.[7] Their reports and articles urge Congress to go back to the drawing board, claiming that the regime of the last twenty-five years has failed to achieve the goals of sentencing reform, pointing to the increasing racial disparity in the nation's prisons, a seemingly irreversible upward ratcheting of sentences, and other deep flaws in the Sentencing Guidelines.[8]

To reflect on the varied rhetorical reactions to *Booker*, this symposium brought together federal judges, prosecutors, defense attorneys, congressional staffers, public interest advocates, and academics. The result was an interesting day of conversation, and at times, spirited debate. Panelists examined sentencing rhetoric

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2005) ("It probably will create additional leverage for defense counsel in negotiating agreements.") (quoting Minnesota U.S. Attorney Todd Jones).

6. *See* David L. McColgin, *Grid & Bear It*, 29 CHAMPION 50, at 51 (Nov. 2005) (discussing the need for defense counsel "to conduct a detailed investigation of the client's life, covering social, family and medical history as well as educational and work background" since courts are now permitted to consider a number of factors which were disallowed under the guidelines). *See also* Alan Ellis & James H. Feldman, Jr., *Representing White Collar Clients in a Post*-Booker *World*, 29 CHAMPION 12, at 14 (Sept.-Oct. 2005) (discussing the need to emphasize rehabilitation and the inadequacy of imprisonment to serve that purpose).

7. *See, e.g.*, Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 119 (2005) (highlighting the federalism concerns in sentencing policy that must be reconsidered); Frank O. Bowman, III, *Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform*, 44 WASHBURN L.J. 495, 495-96, 515 (2005) (discussing the moral values which must be considered in forming a new sentencing system).

8. *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1315-16 (2005) (addressing the problems of excessive prosecutorial power, the complexity of the guideline table, the upward ratcheting of sentences, and the severe constraint on judicial discretion); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 839-40 (2005) (highlighting the four major problems of sentencing: severity, racial disparity, lack of uniformity, and increasing prosecutorial power).

at different levels of abstraction and critically examined (and cross-examined each other on) the influence of partisanship. There were also important discussions about what has been omitted from the discourse, especially the silence and denial that has greeted charges that racial and gender bias are responsible for the dramatic increases in the incarceration of minorities and women under the combined mandatory minimum and Guidelines regime. We also talked a good deal about judicial sentencing rhetoric, especially about what judges say at sentencings, and debated the merits of a recent opinion by Eleventh Circuit Judge Gerald Tjoflat, in which he chastised district court judges for criticizing the Guidelines from the bench as they pronounced sentence.[9] This discussion went to the heart of the role of a judge in a democratic society and how judges could appropriately express their personal views about the fairness of the laws they have sworn to implement.

In addition to the presentation of papers, the symposium utilized smaller breakout sessions to encourage free-flowing discussion, including one panel dedicated to Rhode Island federal practice. This panel featured all three active local federal judges, the U.S. Attorney for the District of Rhode Island and the local Federal Public Defender. Here, much of the discussion focused on whether *Booker* permits judges to sentence below the Guidelines in crack cocaine cases. One member of the panel, Judge William Smith (D. RI), is the author of the widely admired *Perry*[10] decision, which set forth a comprehensive foundation for rejecting the Guidelines' treatment of crack offenses.[11]

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9. United States v. Thompson, 422 F.3d 1285, 1303-04 (11th Cir. 2005) (Tjoflat, J. concurring). Judge Tjoflat argues that such criticism from the bench may make defendants (1) less likely to accept punishment and enter prison in a frame of mind conducive to rehabilitation, and (2) encourage them "to persist in attacking [their] sentence on direct and collateral review." *Id.* In addition, Judge Tjoflat claimed that "[B]y openly disparaging the defendant's sentence, the judge fosters disrespect for the rule of law." *Id.* at 1304.

10. 389 F. Supp. 2d 278 (D.R.I. 2005).

11. During this panel, each of the three judges indicated that they believed that something less than the 100:1 ratio could be appropriate for crack sentences. However, in light of the First Circuit's reversal of Judge Torres's 20:1 ratio in *United States v. Pho*, the future of non-Guideline-based crack sentencing in Rhode Island District Court seems substantially less likely. 433 F. 3d 53 (1st Cir. 2006).

And, of course, the symposium resulted in contributions from many of the participants to this volume of the Roger Williams Law Review. The selections begin with Professor Ron Wright's essay, which provides a framework for understanding the post-*Booker* rhetorical world.[12] He first shows that post-*Booker* sentencing rhetoric can be understood as existing along a continuum from incrementalists, who argue that nothing much has changed, to those with more incendiary claims that *Booker* has created chaos and/or a return to the intolerable disparity and lenient sentences of the past. Second, Professor Wright claims that institutional allegiance is highly predictive in the post-*Booker* environment, with sentencing commissions most reflecting the incremental approach, and prosecutors and conservative legislators leading the "parade of horribles" contingent.[13] Third, Professor Wright posits that each group's rhetorical choices have been consciously influenced by their views about the possible legislative reaction to *Booker*. Judges and sentencing commissioners are most afraid of awakening the sleeping legislative dragon, which might respond with even more rigid sentencing policies, whereas conservatives, outraged over the Court's usurpation of their hard-won restrictions on sentencing discretion, seek to stir Congressional action.

Political Science Professor Naomi Murakawa contributes a provocative article that makes a case for the racialized development of the Sentencing Guidelines.[14] She traces the recent conflict between Congress and the courts over sentencing discretion back to the federal courts' role in the breakdown of Jim Crow and racial segregation in the mid-20th Century. She argues that, while explicit claims about the need for racial order have given way to coded arguments about rising crime rates and the need for uniformity, conservative criticism of the Supreme Court's decisions has sounded consistent themes from *Brown v. Board of*

12. Ronald Wright, *Incremental and Incendiary Rhetoric in Sentencing After* Blakely *and* Booker, 11 ROGER WILLIAMS U. L. REV. 461 (2006).

13. Wright notes that the rhetoric of judges is more varied given the different political backgrounds of the bench but that judges, especially the official organs of the judiciary, are closer to the "wait and see" perspective of the incrementalists. *Id.* at 468-69.

14. Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from* Brown *to* Booker, 11 ROGER WILLIAMS U. L. REV. 473 (2006).

Education through *Booker*. The claims are that federal judges are liberal, elitist, and out of touch with the needs of local communities and that they risk the destruction of the social order by treating minorities with too much leniency. Because of the Warren Court's reputation for liberalism in areas of black civil rights, criminal defense, and prisoners' rights, these claims continue to resonate with voters whether the issue is education or crime.

In laying out this political and darker vision, Professor Murakawa also undermines the narrative of sentencing reform that holds sway over the legal academic literature, which she calls the revolution sparked by disrupted ideals.[15] In the legal/scholarly narrative, research from experts and judges was the major catalyst for the massive shift from the rehabilitative ideal to punishment and the elimination of sentencing disparities. Murakawa notes, however, that political science research does not support this narrative because the motivations for Congressional action generally involve a far messier and more political process. She makes a convincing case that, generally, it is pressure from outside a stable and insular system, such as the indeterminate sentencing regime that had dominated since the mid-nineteenth century, that provokes sudden and radical changes like the Sentencing Reform Act (SRA). Thus, while legal academics prefer to cite the rational and racial justice reasons Senator Kennedy invoked for sentencing reform, it was the critical support of conservative Senators such as McClellan and Thurmond that resulted in the SRA. In support of her thesis, she provides examples of chillingly similar rhetoric that these Southern conservatives used to attack civil rights legislation and the *Brown* decision, alongside their more recent critiques of the sentencing practices of federal judges.

Professor Ian Weinstein's article also offers a historical perspective. He takes a fresh look at the issue of regional disparity through the lens of historical narrative. Despite repeated efforts of Congress and the Commission to enforce national uniformity, significant regional variations in sentencing practices remain.[16] Building on the work of historian David

15. *Id.* at 476-80.

16. *See* Ian Weinstein, *The Historical Roots of Regional Sentencing*

Hackett Fisher, Professor Weinstein suggests that these entrenched regional sentencing practices reflect powerful folkways that accompanied different waves of European immigration. These folkways, he argues, are still embedded in the general and legal cultures of different regions of the nation, where these different groups of settlers first put down roots. His recognition of the continuing resonance of the immigration narrative in American culture poses a substantial challenge to Congressional assertions in the SRA and the Feeney Amendment that the federal criminal justice system can and should encompass a single set of values and practices. As Professor Weinstein writes, "[t]he great American experiment in combining diverse groups has always been characterized by the pull of great unifying moments and the push of compromises that permit sectional, and other, differences to coexist in our federal structure."[17] Therefore, he also argues that *Booker* can be seen as an effort to re-balance the power of regional and national visions for our criminal law.[18] Not only is Professor Weinstein's counter-story to the conservative's narrative of uniformity compelling, it also has far reaching policy implications. The persistence of regional folkway values about crime highlights the role that Congress's federalization of minor drug and gun offenses has played in generating dissatisfaction at the local level, and belies conservative claims that they are the defenders of federalism and states' rights.

Stephanie Weinstein and Arthur Wolfson also contribute a narrative scholarship article that builds on the work of their mentors, Professors Richard Delgado and Jean Stefancic.[19] After positing that the generic narrative structure of a criminal case involves the competing stories of defendant, victim, and prosecutor, Weinstein and Wolfson explore each of these narratives in a highly charged case involving a star African-American high school student convicted of sex offenses involving a white, female co-student. After considering each of the participant's stories, Weinstein and Wolfson suggest that judges

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Variation, 11 ROGER WILLIAMS U. L. REV. 495 (2006).

17. *Id.* at 508.

18. *Id.* at 509.

19. Stephanie Weinstein & Arthur Wolfson, *Toward a Due Process of Narrative: Before You Lock My Love Away, Please Let Me Testify*, 11 ROGER WILLIAMS U. L. REV. 511 (2006).

at sentencing should consider aspects of the counterstories of the defendant and victim that may not have been credited in the all or nothing context of a trial. Without proposing a formula, they offer their narrative theory, which they call the due process of narrative, as a tool by which judges might endeavor to synthesize and harmonize the competing stories in a criminal case. Their due process of narrative, with its explicit intent of inclusiveness, stands in stark contrast to the singularity of the punitive approach embedded in the Guidelines regime. While these authors do not suggest that their narrative framework is likely to be actualized any time soon, their imagination reveals that, nevertheless, there are theoretical approaches to sentencing that could transcend the stale dichotomies of rehabilitation-versus-punishment and discretion-versus-uniformity that have characterized sentencing discourse for too long.

In addition to these articles, which examine the broadest narratives of sentencing rhetoric, the symposium also sought to give equal time to sentencing rhetoric at the individual case and actor level. Two articles in this volume are dedicated to more singular perspectives. Judge Lynn Adelman and Jon Deitrich write about fulfilling *Booker*'s promise. Judge Adelman, one of the clearest and most courageous judicial voices in the post-*Booker* world, does not hide his happiness over the turn of events or minimize their significance, writing that "[a]fter *Booker*, judges need no longer impose sentences that they do not believe in. *Booker* restored a meaningful role to judges at sentencing and enables them to craft sentences appropriate to circumstances of a case."[20] Yet, Judge Adelman is still a typical post-Guidelines judge. He does not seek the unfettered discretion of an earlier era. For him, the Guidelines provide an objective marker against which to measure a sentence,[21] and therefore provide a useful service.

Judge Adelman also welcomes how *Booker* has returned meaningful rhetoric to the courtroom. Instead of unintelligible language about the applicability of particular Guideline provisions, *Booker* directs courts to consider and speak about

20. Lynn Adelman & Jon Deitrich, *Fulfilling* Booker's *Promise*, 11 ROGER WILLIAMS U. L. REV. 521, 521 (2006).

21. *Id.* at 525-28.

traditional sentencing factors such as the circumstances of the case, the character of the defendant and the need for the sentence to reflect the seriousness of the offense and to protect the public. However, to fulfill *Booker*'s promise, Judge Adelman argues that litigants must reinvigorate their sentencing rhetoric, and the body of his article provides a primer and a bevy of possible avenues.[22] For example, Judge Adelman explains that while the Guidelines, through the criminal history axis, focused attention on only the bad things about the defendant's character,[23] § 3553(a)'s instruction to consider the history and characteristics of the defendant now allow judges to fully consider a person's positive character traits so that courts may treat defendants as whole people.[24] Judge Adelman concludes with an admonition that we should not worship the false idol of uniformity, but rather, focus on doing justice in individual cases.[25] No turn of phrase could better capture the core theme of the judiciary in this debate.

Professor Eva Nilsen chose to examine the facts and legal arguments in the Weldon Angelos case.[26] After much anguish, Judge Paul Cassell (D. UT) sentenced Angelos, a first-time offender, to fifty-five years in prison for three small marijuana deals in which he allegedly possessed (but did not use) a handgun. While *Booker* provided Judge Cassell the opportunity to avoid giving Angelos an even longer sentence, the prosecutor's decision to charge multiple gun counts that carry consecutive and mandatory terms left this judge with no ability to go below the fifty-five years. The fact that Judge Cassell is a well-known conservative voice, both as a judge and law professor, garnered his outrage at the severity of this sentence national attention.

Professor Nilsen's contribution is to recognize there are other avenues for constitutional rhetoric to combat the harsh sentencing laws of the modern era besides the Sixth Amendment line of cases

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22. As part of his structural blueprint, Judge Adelman repeats his contention from *United States v. Ranum* that the Guidelines are not entitled to presumptive weight under *Booker* and that, in fact, such a position violates *Booker*'s Sixth Amendment rationale. 353 F. Supp. 2d 984, 986-87 (E.D. Wisc. 2005). *See generally* Adelman & Deitrich, *supra* note 20, at 19.

23. *Id.* at 528.

24. *Id.*

25. *Id.* at 535.

26. Eva S. Nilsen, *Indecent Standards: The Case of U.S. versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537 (2006).

that bore fruit in *Booker*. Using Angelos as a starting point, she argues for reinvigorated rhetoric of cruel and unusual punishment under the Eighth Amendment. She amasses evidence from both this case, and more generally, that the tide of public opinion has turned against extraordinarily long prison sentences for non-violent crimes. For example, she cites legislation in more than a dozen states scaling back mandatory minimum sentences, as well as the amicus brief in *Angelos* signed by 163 former federal prosecutors and judges.

As a rhetorical strategy, Nilsen's focus on the Eighth Amendment's basic concept of cruel and unusual punishment, and the case law's evocation of evolving standards of decency, has great promise. Certainly, these rhetorical hooks are more understandable and appealing than the obscure and seemingly contradictory holding in *Booker*, which increased judicial power under a constitutional provision designed to secure the right to a jury. Nilsen's article is a reminder to lawyers that strategies that failed in the past may bear fruit as political and social conditions change. After all, few scholars before 2000 foresaw *Apprendi, Blakely*, and *Booker*. As Barry Friedman's scholarship makes clear, our democracy has a rhetorical component that exists alongside the formal electoral system and separation of powers structure.[27] Thus, policymaking can be understood as a complex and ongoing conversation among and between the branches of government and the people. Under this framework, *Angelos* could conceivably be the first marker of a new front in the battle over criminal punishment between the Court and Congress.

Finally, in an effort to provide examples of sentencing rhetoric in their most protean form, and to provide access to the otherwise unavailable raw materials, this volume includes transcripts from post-*Booker* sentencing before Rhode Island judges Ernest Torres and Mary Lisi.[28]

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27. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-81 (1993).

28. Judge Torres's contribution is from the post-*Booker* resentencing of former Providence mayor, Buddy Cianci, who was convicted of RICO conspiracy in a case that fixated the region for months. Ultimately, Judge Torres decided that the Guideline sentence he originally imposed was also a reasonable sentence under *Booker,* holding that none of the § 3553(a) factors mandated a different sentence. Resentencing Hearing Transcript, United States v. Cianci, No. 00-83T (D.R.I. 2005), 11 ROGER WILLIAMS U. L. REV. 565

In conclusion, although perhaps many in the sentencing arena are still largely repeating their lines from the Guidelines era, there is no question that *Booker* has at least provided an opening for new and more creative sentencing rhetoric. If this symposium has made a positive contribution to that process, it has been by helping to sensitize the participants, and now readers of these articles, to the narrative structure of sentencing discourse and to the rhetorical choices by various actors in the system. Whether this clarity and insight will move the sleeping dragon to more rational policy choices when it wakes, only time will tell.

My many thanks again to the symposium participants and authors, the Roger Williams University Law School and Law Review editors for their assistance and funding.

(2006). In Judge Lisi's two cases, however, her evaluation of the § 3553(a) factors resulted in sentences below the Guideline ranges. Specifically, she was able to consider factors such as the nonviolent nature of the crime, the defendant's troubled past, and efforts to obtain further education, which probably would not have been grounds for a downward departure under the Guidelines. Sentencing Hearing Transcript, United States v. Vasconcelos, No. 04-081ML (D.R.I. 2005), 11 ROGER WILLIAMS L. REV. 579 (2006) (Judge Mary Lisi presiding); Reconsideration and Correction of Sentence Hearing Transcript, United States v. Luna, No. 03-111ML (D.R.I. 2005) (Judge Mary Lisi presiding), 11 ROGER WILLIAMS L. REV. 589 (2006). Judge Torres's and Judge Lisi's recent Rhode Island District Court cases thus provide a microcosm of how *Booker* has and has not changed sentencing outcomes.